Supreme Court, U.S.
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No. 06-_____

In the

Supreme Court of the United States

DONALD PAUL BOLTON,
Petitioner

v.

MARY BERGHUIS, Warden,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Frank Stanley
Counsel of Record

Frank Stanley, P.C.
200 North Division Avenue
Grand Rapids, MI 49503
(616) 459-8600

Counsel for Petitioner

QUESTIONS PRESENTED

1. WHETHER THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT ABOUT HOW AND WHETHER THE "ACTUAL INNOCENCE" DOCTRINE INTERRELATES WITH THE AEDPA'S LIMITATION PERIOD FOR FIRST PETITIONS?

2. WHETHER THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER, BECAUSE OF SCIENTIFIC ADVANCES, POLYGRAPH EVIDENCE IS NOW SUFFICIENTLY RELIABLE TO ESTABLISH ACTUAL INNOCENCE AND/OR WHETHER THIS CAUSE SHOULD BE REMANDED FOR A HEARING ON RELIABILITY AND ACTUAL INNOCENCE?

3. WHETHER THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT ABOUT WHETHER EVIDENCE THAT IS INADMISSIBLE AT TRIAL CAN BE CONSIDERED AS PART OF THE ACTUAL INNOCENCE ANALYSIS?

4. WHETHER THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE FIFTH, EIGHTH AND/OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION ARE VIOLATED WHEN A FIRST HABEAS PETITIONER SEEKING REVIEW ON ACTUAL INNOCENCE GROUNDS IS DENIED RELIEF FOR PROCEDURAL REASONS, INCLUDING A REFUSAL TO INVOKE THE DOCTRINE OF EQUITABLE TOLLING?

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Donald Paul Bolton respectfully petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgments entered on January 13, 2006 and April 24, 2006. 1a.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not published. It is reported at 164 Fed.Appx. 543 (6th Cir. 2006). A copy of the opinion is attached at App. 1a.

JURISDICTION

The Sixth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. 1291 and 28 U.S.C. 2253(a). The District Court had jurisdiction pursuant to 28 U.S.C. 2254. This Court's jurisdiction is invoked under 28. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states that no person shall be deprived of liberty without Due Process of Law. App. 16a.

The Eighth Amendment of the United States Constitution states that cruel and unusual punishments shall not be inflicted. App. 17a.

The Fourteenth Amendment of the United States Constitution states that the Fifth Amendment applies to the States. App. 18a.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2244(d) sets forth the time periods during which a state prisoner may file a Petition for Habeas Corpus, pursuant to 28 U.S.C. 2254. 28 U.S.C. 2244(b)(2)(B)(ii) sets forth the statutory version of the actual innocence exception for successive petitions. These statutes are attached as Appendix B, C, and D.

INTRODUCTION

The Petitioner is serving a life sentence based on a variety of Michigan convictions, the most serious of which is assault with intent to murder. The Petitioner's federal habeas petition was based on ineffective assistance of counsel. Among other things, the habeas petition argued that his trial attorney had a conflict of

interest which the trial attorney had not disclosed to the Petitioner or to the Michigan trial court. The habeas petition also argued that the Petitioner had received ineffective assistance when his trial attorney submitted a report to the sentencing court which was used to enhance his sentence from a minimum sentence of 8 years to life. The Michigan Court of Appeals used that same report to affirm the sentencing departure.

The State moved to dismiss the petition on the grounds that it had not been timely filed. The Petitioner argued that the petition was timely filed, but that if it was not, the doctrines of equitable tolling and/or actual innocence should allow him to proceed forward to the merits.

In support of his actual innocence claim, the Petitioner provided the affidavit of a nationally known polygraph expert. App. 19a. That expert explained that the reliability of polygraph examinations had advanced markedly in the last few years and that there was a greater consensus that properly administered polygraph tests were reliable.

The Petitioner had been given a polygraph test about the incident that led to his conviction for assault with intent to murder. The Petitioner passed that test, indicating that he was innocent of that charge. That result was important because the Petitioner had served all but one of his lesser sentences and was being incarcerated because of the life sentence imposed for the assault with intent to murder conviction.

The nationally known expert examined the charts used by the polygraph operator by using the expert's independent methodology. The expert opined that the polygraph results were reliable.

The Petitioner sought a hearing and argued that this proof of actual innocence should allow him to excuse any procedural default. *E.g., Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005). Both the district court and the Sixth Circuit Court of Appeals disagreed, noting, among other things, that the results of polygraph tests are not admissible in Michigan at trial.

This Petition is respectfully asking this Court to review four inter-related issues regarding actual innocence. Specifically:

1) There is a Circuit split about how an actual innocence claim affects procedural default.

The Sixth Circuit has held that actual innocence should be viewed as a gateway. *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005). Thus, if a habeas petitioner can demonstrate that it is more likely than not that no reasonable juror could have found him guilty, procedural default should be excused, and the petitioner should be allowed to reach the merits of his claims. *Id.*

By contrast, the Seventh Circuit has taken the position that actual innocence is not a free standing reason to excuse procedural default. *E.g., Escamilla v. Jungwirth,* 426 F.3d 868 (7th Cir. 2005); *Araujo v. Chandler,* 435 F.3d 678 (7th Cir. 2005). Rather, the petitioner must show that he or she had otherwise acted in a timely manner. *Id.* If the Petitioner did not act timely, then the Petitioner must establish his or her right to invoke the doctrine of equitable tolling or some other reason why the procedural default should be excused.

The Eighth Circuit has held that actual innocence is relevant to tolling of the applicable time periods, but that the petitioner must also show that he or she acted with reasonable diligence in discovering the underlying facts and that a reasonably diligent petitioner could not have discovered the underlying facts in time to file a timely petition. Wrongdoing on the part of the State which prevented the discovery of the relevant facts in a timely fashion would be an example of a reason which could justify an exception. *Flanders v. Graves,* 299 F.3d 974 (8th Cir. 2002).

Finally, the Second and Ninth Circuits have avoided a ruling on the question of whether actual innocence is or is not a gateway to the merits by first requiring the district court to determine if the petitioner has made a sufficient showing of actual innocence. *Whitley v. Senkowski,* 317 F.3d 223 (2d Cir. 2003); *Majoy v. Roe,* 296 F.3d 770 (9th Cir. 2002).

The Petitioner is respectfully asking this Court to grant the Petition so that the circuit split can be resolved and so that the interrelationship between the actual innocence doctrine and the AEDPA time limits can be clarified.

2) In *United States v. Sheffer,* 523 U.S. 303 (1998), this Court ruled, in the context of a military court martial proceeding, that an evidentiary rule which precluded the use of polygraph evidence did not deprive the defendant of his constitutional right to present a defense. Among other things, this Court noted that the defendant was not prevented for presenting underlying facts which would influence the fact finder in his favor. Polygraph evidence was characterized as expert testimony which was designed to bolster the defendant's position as opposed to evidence designed to prove underlying facts.

In reaching this result, Justice Thomas, writing for the majority, noted that there was considerable division among the scientific community as to the reliability of polygraph tests. This lack of reliability was another reason given to support the decision.

Since 1998, there have been considerable advances in the field of polygraph examinations. Those advances have led to a greater consensus regarding the reliability of polygraph examinations.

The Petitioner had presented evidence of those advances to the district court and had sought a hearing so that a record could be made about those advances. Such a hearing would be about the reliability of such tests. If reliability could be established, it was the Petitioner's position that the polygraph evidence could be considered in connection with actual innocence and with the excusing of any procedural default. In this regard, the Petitioner informed the district court and the Sixth Circuit that both Georgia and New Mexico had reacted to this new evidence about the reliability of polygraph testing and had changed their previous positions regarding polygraph evidence. *Lee v. Martinez,* 136 N.M. 166, 96 P.3d 291 (2004); *Height v. State,* 278 Ga. 592, 604 N.E.2d 796 (2004).

The Petitioner is respectfully asking this Court to grant certiorari so that the related question of whether polygraph evidence can be used to invoke the actual innocence doctrine can be considered by this Court on its merits.

3) In *Schlup v. Delo,* 513 U.S. 298 (1995), this Court focused on whether the evidence of innocence meant that no rational jury was likely to convict the defendant at trial.

Both the district court and the Sixth Circuit noted that polygraph evidence was not admissible at trial in Michigan. Those Courts therefore concluded that since the proffered polygraph evidence was inadmissible at trial, that evidence could not be used to excuse a procedural default.

The Petitioner had argued that this fact should not be a bar for two primary reasons: 1) Michigan's rule c admissibility dated from 1982. There have been numerous advances in the polygraph examination field since 1982, but the Michigan Supreme Court has not had an opportunity to revisit its 1982 position in the light of more recent developments. Thus, it was the Petitioner's position that the old evidentiary rule should not be considered a bar to using actual innocence as a reason to excuse procedural default; and 2) Michigan does allow polygraph evidence to be used for other purposes, including a motion for a new trial. Thus, while the jury's decision was not based on the polygraph evidence, the ultimate outcome of the trial could be affected if the trial court was persuaded that the paucity of trial evidence plus the evidence of actual evidence provided by the polygraph results justified a new trial.

The Petitioner submits that the invocation of the actual innocence doctrine to excuse procedural default in a federal habeas proceeding should not depend on geography. Specifically, some states, such as Georgia and New Mexico, allow polygraph evidence to be used at trial. The Petitioner submits that there is no principled reason why a New Mexico defendant should be allowed to excuse procedural default while a Michigan defendant in the same position should be denied an opportunity to seek relief on the merits.

There is also a circuit split about the question of whether inadmissable evidence can be used to establish factual innocence for purpose of going through the gateway to merits despite procedural default.

The Petitioner is respectfully asking this Court to grant the Petition to address the inter-related question of whether the actual innocence doctrine depends on the admissibility of evidence at trial or whether inadmissible evidence can excuse procedural default if that evidence is either persuasive evidence of innocence or usable in other contexts such as new trial motions.

The Petitioner is also respectfully asking this Court to grant the Petition so that the Circuit split about what evidence can be considered to establish actual innocence can be resolved.

4) All Circuits other than the First Circuit recognize that equitable tolling can be a reason to allow an otherwise defaulted habeas petition to be considered ~~on its merits. The~~ Circuits are generally in agreement that equitable tolling should be only used in exceptional cases.

The Circuits use different principles to make the equitable tolling analysis. These principles are judge-made and are not based on constitutional concerns.

The Sixth Circuit uses a five-pronged test and applies that test on a case-by-case basis.

Members of this Court have expressed concern that the incarceration of an actually ~~innocent~~ person raise concerns under the Fifth and Eighth Amendments. This Court has also drawn a distinction between "first" petitions and "successive" petitions. These is especial concern about denying any consideration of a "first" petition because such a decision will deprive the habeas petitioner of any opportunity to have constitutional claims reviewed on their merits.

Circuits other than the Sixth Circuit have also expressed these concerns and have fashioned remedies for first-time habeas petitioners who would otherwise be denied consideration because of procedural default.

The Petitioner is respectfully asking this Court to grant the Writ so that the question of whether constitutional rather than judge-made considerations should control the analysis when a habeas petitioner is raising claims of actual innocence.

STATEMENT OF THE CASE

The charges arose out a routine traffic stop that had gone awry. The Petitioner resisted the police officer, and there was a struggle for the officer's weapon. Shots were allegedly fired. The police officer was not seriously hurt, and the Petitioner turned himself in within a few days of the incident. The Petitioner was tried and convicted. He was sentenced to life in prison based on the assault with

intent to commit murder conviction and 15 to 30 years in prison based on an armed robbery conviction. Lesser sentences were imposed for other convictions. The incident occurred on September 3, 1992. The Petitioner has thus been incarcerated for almost 14 years.

The Petitioner appealed to the Michigan Court of Appeals and thereafter to the Michigan Supreme Court. Both Courts denied relief. *People v. Bolton*, Case No. 165706 (COA, 7/25/95); *People v. Bolton*, 451 Mich 910, 550 N.W.2d 528 (1996). The Michigan Supreme Court denied leave to appeal on May 31, 1996. The Petitioner did not seek relief from this Court.

In January of 1999, the Petitioner filed a Motion for Relief from Judgment in the trial court. That Court denied relief on April 17, 2001. The Michigan Court of Appeals denied leave to appeal as did the Michigan Supreme Court. The Michigan Supreme Court denied relief on March 4, 2002. *People v. Bolton*, 465 Mich 959, 640 N.W.2d 875 (2002). The federal habeas petition was filed within 30 days of the Michigan Supreme Court's decision.

The Respondent filed a motion to dismiss on timeliness grounds. That motion was denied in April of 2003 without prejudice. The Respondent filed a second motion to dismiss raising essentially the same issues presented in the first motion.

Prior to the district court's ruling, the Sixth Circuit Court of Appeals decided *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005). Citing this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), the Sixth Circuit held that actual innocence can be a gateway to the merits even if there is a procedural default.

The Petitioner had recently learned about significant advances in the science of polygraph examinations. Those advances related to the reliability of polygraph tests. Based on these new scientific advances the Petitioner took a polygraph test. The Petitioner passed. The focus of the questions asked were the facts underlying the assault with intent to murder conviction. The Petitioner's truthful answers indicated that he was actually innocent.

Petitioner's counsel contacted a nationally-recognized expert. That expert examined the charts prepared by the polygraph exam-

iner. He then used his own formulas to check the reliability of the examination. The expert concluded that the charts were properly done and that the outcome was reliable.

He submitted a lengthy affidavit in support of the reliability of polygraph examinations in general and the reliability of the Petitioner's test in particular. App. 19a. This affidavit was in turn submitted to the district court as an additional reason to excuse any timeliness problem.

A hearing was requested, but none was held. The district court granted the Respondent's Motion to Dismiss, but certified all questions to the Sixth Circuit.

The Sixth Circuit affirmed the dismissal. As to equitable tolling, the Sixth Circuit held: 1) The Petitioner had argued that mandatory equitable tolling should apply. The Sixth Circuit rejected that argument because the Petitioner's petition was not a mixed petition. The Sixth Circuit thus concluded that the Petitioner did not fall within the narrow group of habeas petitioners that mandatory tolling was designed to protect; and 2) Alternatively, the Petitioner had argued that traditional equitable tolling should excuse any procedural problems. The Sixth Circuit identified a five-factor analysis used by that Circuit. *See, e.g., Andrews v. Orr,* 851 F.2d 146 (6th Cir. 1988). The Sixth Circuit concluded that the Petitioner did not qualify under that analysis.

As to the Petitioner's actual innocence claim, the Sixth Circuit held: 1) The Sixth Circuit recognizes that actual innocence can be a gateway through which an otherwise time-barred habeas petitioner can pass. Such a habeas petitioner can then argue the merits. *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005); 2) The Sixth Circuit quoted this Court's decision in *Schlup* for the proposition that actual innocence must be proven using "new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial". 513 U.S. at 324; 3) The Sixth Circuit noted that polygraph examinations are not admissible at a trial in Michigan; 4) The Sixth Circuit cited a 1988 Michigan case for the proposition that such tests are neither scientifically valid or reliable; 5) The Sixth Circuit acknowledged that other states (New Mexico and Georgia) had changed their position in 2004 based on subsequent scientific

developments, but noted that this had not happened in Michigan; 6) The Sixth Circuit also held that the admissibility of evidence is a state rather than a federal issue; 7) The Sixth Circuit cited this Court's decision in *United States v. Sheffer,* 523 U.S. 303 (1998) for the proposition that polygraph evidence is not reliable; and 8) Because the evidence was not admissible or reliable, the actual innocence exception would not apply.

Alternatively, the Sixth Circuit opined that the polygraph tests did not establish actual innocence.

REASONS FOR GRANTING THE WRIT

1. The Circuits are Split on the Question of How and Whether the Actual Innocence Doctrine Interrelates with the AEDPA's Limitation Periods for First Petitions. By Granting the Writ, this Court Could Resolve That Circuit Split and Give Guidance as to the Application of the Actual Innocence Doctrine to Procedurally Defaulted Habeas Petitions.

This Court has held that a fundamental miscarriage of justice provides federal courts with an opportunity to review procedurally defaulted claims. *Herrera v. Collins,* 506 U.S. 390 (1993). The fundamental miscarriage exception can be invoked by a showing that a constitutional violation resulted in the conviction of an actually innocent person. *Murray v. Carrier,* 477 U.S. 478 (1986).

The actually innocent doctrine was developed to mitigate the potential harshness of judicial limitations placed on a petitioner's ability to file successive or otherwise procedurally defaulted habeas petitions in the federal courts. *E.g., Schlup v. Delo,* 513 U.S. 298 (1995).

Schlup set forth the standards that a petitioner must meet in order to qualify for the actual innocence exception: 1) A claim of actual innocence must be based on reliable new evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial; 2) The habeas court must determine whether the new evidence is trustworthy by considering it on its merits and in light of the pre-existing evidence in the record; and 3) Once the new evidence is

determined to be reliable, the reviewing court should consider a petitioner's claim in light of the record as a whole.

In *Bousley v. United States,* 523 U.S. 614 (1998), this Court applied the actual innocence doctrine in a non-capital case and remanded for a hearing to determine whether the petitioner could establish actual innocence.

The Circuits are divided as to how these principles should be applied to any given case.

In *Escamilla v. Jungwirth,* 426 F.3d 868 (7th Cir. 2005), the Seventh Circuit held that actual innocence is not a free-standing exception to the timeliness requirements. The Seventh Circuit held that "actual innocence" is unrelated to the statutory timeliness rules. "Actual innocence" may be grounds for permitting a second and successive petition, pursuant to 28 U.S.C. 2244(2)(B)(ii), but, in the Seventh Circuit's view, actual innocence does not clear away the time to seek collateral relief.

The Seventh Circuit couched the analysis in terms of: 1) the factual predicate could not have been discovered earlier; and 2) the prisoner shows actual innocence by clear and convincing evidence.

If evidence of actual innocence is not newly discovered, then the prisoner has no remedy unless the prisoner can establish entitlement to relief by way of traditional equitable tolling.

The Seventh Circuit affirmed this analysis in *Araujo v. Chandler,* 435 F.3d 678 (7th Cir. 2005), again holding that actual innocence was not a free standing reason to allow a habeas petitioner to reach the merits of his or her claim.

A contrary analysis was made by the Sixth Circuit in *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005). In *Souter,* the Sixth Circuit held that if a habeas petitioner can demonstrate that it is more likely than not that no reasonable juror could have found the habeas petitioner guilty, the habeas petitioner should be allowed to reach the merits. Said differently, in the Sixth Circuit, actual innocence is a free-standing reason to excuse any procedural default.

The Petitioner's position is that the Sixth Circuit's analysis is correct, but, as discussed *infra,* it was misapplied in his case

because he was never given a hearing so that a record could be developed regarding his actual innocence claim. The Petitioner is thus setting forth the analysis in *Souter* in some greater detail. Specifically:

In *Souter,* the defendant was convicted in 1992 of murder. His habeas petition was filed beyond the limitations period.

The incident occurred in 1979. The evidence showed that the defendant was the last known person to see the decedent alive. The two had met that evening at a bar and had continued to a party at a third-party's home. Everyone was drinking heavily during the evening, including both the defendant and the decedent. As the two were talking in the front yard of the home, the decedent abruptly decided that she wanted to go home. She started walking north-bound along the highway. The defendant testified that he followed her for awhile, trying to persuade her to return. He gave up and returned to the party.

Individuals who had observed the defendant returning to the party did not see any blood on the defendant's clothes and did not observe any unusual behavior on the defendant's part.

A motorist saw the decedent's body and sought help. Once the news of the discovery of the decedent's body was learned at the party, the partygoers, including the defendant, walked to the scene which was about 900 feet away. As the defendant was walking toward the scene, he discarded the now-empty bottle of Canadian Club whiskey that he had been drinking. A deputy sheriff eventually drove the defendant back home. The deputy observed that the defendant was very intoxicated but did not observe any blood on the defendant's clothing.

The following day, the police recovered the bottle that the defendant had discarded. When questioned, the defendant denied any wrongdoing and cooperated with the investigation. A laboratory analysis of the bottle revealed a trace of Type A blood on the label. Both the defendant and the decedent had type A blood, as does almost 50% of the American population.

The investigators learned that the defendant had cut his finger on a jagged door handle at the home where the party was being held.

The investigation eventually ran its course, and no charges were brought. In 1991, a newly elected sheriff re-opened the case. No new evidence was discovered. However, an expert was found who was willing to state that the decedent's rather unique injuries were caused by the bottle that the defendant had discarded. The expert also opined that it was "virtually impossible" for the injuries to have been caused by the side mirror of a passing vehicle.

Based on this opinion, an arrest warrant was issued for the defendant. Two other experts were located who testified consistently with the first expert. A forensic pathologist testified for the defense.

The defendant was convicted of second-degree murder in March of 1992. The direct appeal process concluded in 1996, without relief being granted. The defendant filed a Michigan post-conviction motion in November of 1999. The motion was denied and the appeal process for the collateral action ended on January 30, 2001. The habeas petition was filed on January 30, 2002.

The habeas petition was based on ineffective lawyering and Due Process violations. In support of these claims, the petition recited new evidence which had been obtained over the years:

A. An affidavit from a private investigator who had gotten information from the bottle manufacturer and a forensic technician which contradicted the testimony of the State's primary expert;

B. An affidavit from the coroner recanting his previous support for the expert and now opining that the bottle could not have caused the wounds;

C. An affidavit from the second supporter of the primary expert, also recanting his prior support;

D. An affidavit from the former police laboratory technician stating that bottle did not have a sharp edge in 1979 and that the blood evidence was of little value because Type A was so common in the population; and

E. Photographs, which were allegedly not in evidence at trial, showing that the decedent's clothes were soaked in blood.

The State of Michigan moved for summary judgment on the grounds that the defendant's petition was barred by the one-year lim-

itation. The magistrate recommended that the motion be denied on the grounds that the defendant had not produced enough evidence of actual innocence to allow the Court to reach the merits of the claim. The district judge granted the dismissal motion, reasoning that the defendant did not demonstrate actual innocence. The district judge opined that "none of the evidence conclusively established that the bottle could not have inflicted the wounds on the victim". The district judge was also not persuaded by the recanted expert opinions.

The Sixth Circuit reversed. The components of the decision were:

A. The Petition was not filed timely;

B. The Petitioner was entitled to equitable tolling because the newly discovered evidence establishes a credible claim of actual innocence;

C. This was an issue of first-impression because neither the Sixth Circuit nor the United States Supreme Court had addressed whether an actual innocence exception to the one-year limitations period exists;

D. The Sixth Circuit held that such an exception does exist;

E. The question is thus whether the "new facts raise sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial";

F. Actual innocence is factual innocence, not mere legal insufficiency;

G. Evidence of actual innocence can include exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence; and

H. The evidence collected over a number of years was sufficient to convince the Court that the defendant had presented sufficient evidence of actual innocence to allow the habeas court to reach the merits of his petition.

The Sixth Circuit noted that the only evidence which tied the defendant to the death was the bottle. There was now reason to doubt that the bottle was the murder weapon. The Sixth Circuit was

also impressed by the pictures showing the victim as being extremely bloody. These pictures could have been used in support of the defendant's case because the witnesses, including a deputy, had not seen blood on the defendant's clothing.

The result of the evidentiary evaluation was that the defendant had met his burden of establishing a "gateway actual innocence claim". The defendant could now pass through the gateway and argue the merits of his underlying claim.

The Sixth Circuit made it clear that the defendant's burden was not to show that he would ultimately prevail. The Sixth Circuit noted that there was evidence which could inculpate him and that he could eventually lose. However, the possibility of losing did not prevent him from having an opportunity to argue the merits. The district court was reversed, and the cause was remanded for further proceedings.

Had these facts been presented to the Seventh Circuit, that Circuit would have denied relief. The Circuit split is thus illustrated.

Cases from other Circuits also illustrate the split.

In *Flanders v. Graves*, 299 F.3d 974 (8th Cir. 2002), the Court viewed the issue as one of statutory construction. 28 U.S.C. 2244(b)(2)(B)(ii), which deals with second or successive petitions, specifically provides an actual innocence exception to procedural bar. By contrast, 28 U.S.C. 2244(d)(1), which is the AEDPA's general limitations statute, does not refer to actual innocence.. The Eighth Circuit opined that, as a result, the actual innocence doctrine does not apply to first petitions which were not filed within the one year limitations period set forth at 28 U.S.C. 2244(d)(1).

The Eighth Circuit recognized that equitable tolling had been applied to limitations period even in the absence of statutory authorization.

The Eighth Circuit also recognized that there may be some factual situation where actual innocence could apply to a first petition. For example, if the State prevented the petitioner from discovering the underlying facts in time to timely file, an exception might be appropriate. Relief was denied in the instant case because the peti-

tioner had not made the sort of exceptional showing envisioned by the Eighth Circuit.

The Second Circuit is split from the Eighth Circuit on the issue. Specifically, the Second Circuit has expressed the opinion that the issue is constitutional rather than statutory and that procedural denial of a person claiming actual innocence would raise serious constitutional problems. *Triestman v. United States,* 124 F.3d 361 (2d Cir. 1997). The issue in *Triestman* was whether a petitioner should be allowed to bring a habeas petition pursuant to 28 U.S.C. 2241 because a section 2255 petition would be barred. The Court allowed the habeas petition because it concluded that it would be a violation of the Fifth and Eighth Amendments if an innocent person was procedurally foreclosed from establishing that innocence. *See, also, Herrera v. Collins,* 506 U.S. 390, 432, n. 2 (1993) (Blackmun, J. dissenting and stating that it "may violate the Eighth Amendment to imprison someone who is actually innocent".).

Both the Third and the Tenth Circuits have expressed constitutional concerns similar to those expressed by the Second Circuit in *Triestman. In re Dorsainvil,* 119 F.3d 245 (3d Cir. 1997) (where no avenue of judicial review is available to a party who claims factual innocence, thorny constitutional issues arise); *Miller v. Marr,* 141 F.3d 976 (10th Cir. 1998) (if AEDPA prevented an actually innocent person from a first habeas petition, serious constitutional issues are raised).

As to the actual innocence split among the Circuits, the Second and the Ninth Circuits have taken an approach which differs from the Sixth, Seventh, and Eighth Circuits.

In *Whitley v. Senkowski,* 317 F.3d 223 (2d Cir. 2003), the Second Circuit declined a decision about whether the Constitution required an actual innocence exception to the AEDPA. However, the Second Circuit also held that the district court could not summarily dismiss a petition asserting actual innocence as time-barred.

Since the district court had dismissed and since the Second Circuit did not have a record from which to make a principled judgment, the Second Circuit remanded the case to the district court with instructions to examine specific questions sequentially:

A. Did the petitioner pursue his actual innocence claim with reasonable diligence?;

B. If not, must the actual innocence claim be pursued with reasonable diligence in order to raise the issue of whether the United States Constitution requires an actual innocence exception to the AEDPA statute of limitations?;

C. If the United States Constitution requires such an exception, did the petitioner present a credible claim of actual innocence?; and

D. If the petitioner presented a credible claim of actual innocence, does the United States Constitution require an actual innocence exception to the AEDPA statute of limitations.

See. also, Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004) (affirming that the Second Circuit has not decided whether actual innocence excuses procedural default, but concluding that the testimonial evidence proffered was not reliable, thus making it unnecessary to reach the ultimate issue).

The Ninth Circuit addressed the question in *Majoy v. Roe,* 296 F.3d 770 (9th Cir. 2002). In *Majoy,* the petitioner asserted that he was actually innocent, but the district court dismissed the petition as untimely without addressing the actual innocence question.

The Ninth Circuit concluded that there was a distinct possibility that, if given an opportunity, the petitioner could muster a plausible case of actual innocence.

The Ninth Circuit acknowledged that this Court has not answered the question of whether a petitioner who survives the rigors of the *Schlup* gateway can override the AEDPA one-year statute of limitations. Because the Ninth Circuit did not want to get into this thorny legal question on a hypothetical record, the Court remanded to the district court for further proceedings to determine whether there was credible evidence of the petitioner's actual innocence.

See, also, Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003) (applying the *Schlup* principles to a guilty plea and holding that the issue was whether the evidence was newly presented evidence as opposed to new evidence; remanded for an evidentiary hearing) and *Jaramillo v. Stewart,* 340 F.3d 877 (9th Cir. 2003) (same).

The Petitioner is respectfully asking this Court to grant the writ so that this significant split among the Circuits can be addressed on the merits by this Court.

As to his own case, it is the Petitioner's position that a blend of the approaches taken by the Second, Sixth, and Ninth Circuits would be the appropriate analysis, i.e.:

A. Actual innocence can be a gateway which would override the AEDPA statute of limitations;

B. The *Schlup* analysis should be used when deciding whether a petitioner is actually innocent;

C. Due diligence should not be the issue. Rather, the question should be whether the evidence is newly presented to the habeas court and whether the newly presented evidence is credible; and

D. A habeas petitioner making an actual innocence claim should be afforded an evidentiary hearing so that the petitioner can have a fair opportunity to show that his evidence is credible and that the credible evidence establishes actual innocence.

In the Petitioner's case, he asked for a hearing. That hearing would have had two primary purposes:

A. Provide a factual basis for the proposition that the science of polygraph testing had advanced in recent years and that the scientific community now regards polygraph testing as a reliable indicator of whether a person is being truthful; and

B. Provide reasons why the Petitioner should be deemed factually innocent of the crime of assault with intent to murder.

The polygraph examination indicated that the Petitioner did not shoot or attempt to shoot the police officer, that the Petitioner did not hold a gun to the police officer's head, and that the Petitioner did not fire any shots while in the police cruiser.

The Sixth Circuit relied on other testimony in the record to conclude that a rationale jury could have still convicted the Petitioner of assault with intent to murder. However, when that testimony is viewed in light of the totality of the record, the Petitioner submits that the Sixth Circuit's reliance on that testimony was misplaced. If

the Petitioner had been given a hearing, he could have demonstrated that he was factually innocent of assault with intent to murder and that the testimony relied upon by the Sixth Circuit went to other issues and not to the life offense.

For all of these reasons, the Petitioner is respectfully asking this Court to grant the Petition and to address the circuit split on the merits.

2. There have been Significant Advances in the Science of Polygraph Examinations since this Court's Decision in *United States v. Sheffer*, 523 U.S. 303 (1998). This Court should Grant Certiorari to Address the Question of whether the Cause should be Remanded so that Petitioner can have an Opportunity to Demonstrate that the Results of a Polygraph Examination are the Type of Reliable Evidence Envisioned by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995).

In *United States v. Sheffer*, 523 U.S. 303 (1998), this Court was asked to decide whether a per-se exclusion of polygraph evidence in a military court martial proceeding violated the petitioner's right to present a defense.

This Court has a long history of striking down per-se exclusionary rules because they impermissibly interfered with a criminal defendant's right to present a defense. *E.g., Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 84 (1973).

In *Sheffer*, however, this Court decided that the per-se exclusion of polygraph evidence did not offend the Constitution. Among other things, this Court reasoned that the evidentiary rule did not bar the defendant from presenting favorable factual evidence. All that was barred was an expert opinion which, if allowed, would bolster the defendant's position about how the factual evidence should be interpreted. In addition, this Court noted that the scientific community was split about the reliability of polygraph evidence. Because of the polarized opinions and the lack of consensus in the scientific community, there was a serious question about whether polygraph evidence is sufficiently reliable to be admissible.

In the Petitioner's case, he had always taken the position that he did not intend to murder the police officer. His conviction depended solely on the testimony of the police officer who had initiated the traffic stop. The officer testified that while he and the Petitioner were in the vehicle, the officer heard a gunshot and felt a burning sensation in his head. The officer was the only source of testimony about what the Petitioner had allegedly said to him during their encounter.

The officer admitted that he never saw a pistol discharge and that he never saw any muzzle flash. The officer also admitted that there was no evidence that he had sustained powder burns. The officer conceded that no one ever found any spent casings in the cruiser and that there was no damage to the cruiser resulting from a pistol being allegedly discharged within the vehicle. The officer also testified that he had never told another officer who had arrived on the scene that he had been shot.

The Petitioner's defense attorney opined that the officer was exaggerating his story about what had occurred in order to cover up the officer's mishandling of the entire situation. However, because the Petitioner's attorney had taken no steps to preserve the cruiser for physical examination or to investigate whether the officer had actually been wounded and, if so, what was the nature of that wound, there was no physical evidence presented to the jury to support this opinion.

These omissions are part of the claims of constitutionally ineffective lawyering that would be litigated if the Petitioner is allowed to reach the merits.

It is the Petitioner's position that if he was allowed an evidentiary hearing, he would be able to establish two important propositions:

A. The polygraph examination results are reliable evidence of factual innocence.

Attached as an Appendix to this Petition is the affidavit of a nationally known expert in the field of polygraph examinations. App. 19a. This expert, a University professor, is in the forefront of

the efforts being made in the scientific community to establish that the science of polygraph testing has advanced markedly in the last few years and that the results of a properly administered polygraph test are a reliable indicator of the truth or falsity of the subject's answers.

In support of that opinion are the findings of a number of Courts that have determined that polygraph testimonies reliable in non-trial settings. For example, Courts have recognized that a polygraph is a useful tool in the investigation and rehabilitation and treatment of offenders. *Oregon v. Graville,* 82 Or. App. 253, 728 P.2d 561 (1982); *California v. Miller,* 208 Cal.App.3d 1311, 256 Cal.Rptr. 587 (1989); *State v. Riles,* 135 Wash2d 326, 957 P.2d 655 (1998); *State v. Jacobsen,* 95 Wash App 967, 977 P.2d 1250 (1999); *Ex Parte Renfro,* 999 S.W.2d 557 (Tx. App. 1999).

Additional support is found in the decisions of several federal courts to allow the consideration of polygraph results. *E.g., United States v. Galbreth,* 907 F.Supp. 877 (D.N.M. 1995); *United States v. Crumby,* 895 F.Supp. 1354 (D. Ariz. 1995); *United States v. Cordoba,* 104 F.3d 225 (9th Cir. 1997).

At least two states have reversed long-standing positions on polygraph evidence and have allowed the results to be considered. *Lee v. Martinez,* 136 N.M. 166, 96 P.3d 291 (2004); *Height v. State,* 278 Ga. 592, 604 N.E.2d 796 (2004).

Finally, even though Michigan does not allow polygraph evidence at trials, the results of such tests can be used for certain purposes including a motion for a new trial. *E.g., People v. McKinney,* 137 Mich App 110, 357 N.W.2d 825 (1984). Thus, in Michigan, the polygraph evidence could be used to upset a verdict.

One of the seminal propositions of *Schlup v. Delo,* 513 U.S. 298 (1995) is that the evidence of actual innocence must be reliable.

The Petitioner sought to prove that his polygraph tests were reliable in the district court, but was denied an opportunity to do so. It is the Petitioner's position that had he been allowed to make a full presentation, he could have established that polygraph results were now sufficiently reliable to be considered in the context of a habeas petition and the actual innocence doctrine. *Cf. Bousley v. United*

States, 523 U.S. 614 (1998) (remanding for hearing on actual innocence); *Whitley v. Senkowski,* 317 F.3d 223 (2d Cir. 2003) (same); *Griffin v. Johnson,* 350 F.3d 956 (9th Cir. 2003) (same).

B. The Petitioner's answers to the polygraph questions establish his actual innocence of the assault with intent to murder charge.

The factual basis for that conviction was the alleged discharge of a weapon in the cruiser with the result that the officer was allegedly wounded.

The Petitioner's answers, if deemed true, establish his actual innocence because he did not shoot or attempt to shoot the officer, because he did not hold a gun to the officer's head, and because he did not fire any shots while in the police cruiser.

The Sixth Circuit's points of disagreement were misplaced. The Sixth Circuit relied on the testimony of the officer that the Petitioner yelled at his cousin to "kill him". However, there is nothing in the record that shows that the cousin fired a shot at the officer when the parties were in the cruiser. Moreover, there is no corroboration that the statement was ever made or that the statement was made under conditions where the Petitioner would have had the specific intent to kill.

The Sixth Circuit pointed to the fact that there was a physical altercation between the Petitioner and the officer. However, the fact of a physical altercation doesn't establish an intent to kill.

The Sixth Circuit noted that the Petitioner had obtained possession of the officer's weapon. However, possession of a weapon does not establish an intent to kill, particularly in light of the polygraph examination results which indicate that the Petitioner fired no shots while in the police cruiser and did not shoot or attempt to shoot the officer.

Finally, the Sixth Circuit relies on the fact that the Petitioner fired a weapon in the general direction of the cruiser while fleeing the scene with his cousin. This reliance is misplaced because the Petitioner was charged with assault to murder with respect to that shot but he was not convicted of that charge by the jury.

In sum, if the Petitioner had been given a hearing, he could have presented a credible claim of actual innocence with respect to the assault with intent to murder charge.

For all of these reasons, the Petitioner is respectfully asking this Court to grant certiorari so that these issues can be considered and so that this Court can decide whether the cause should be remanded, as in *Bousley*, for an evidentiary hearing on polygraphs and actual innocence.

3. Certiorari Should be Granted to Resolve the Circuit Split Over Whether Evidence Must be Admissible Before it can be Considered as Evidence of Actual Innocence.

Polygraph evidence is not admissible in a Michigan criminal trial. *E.g., People v. Ray* 431 Mich 260, 430 N.W.2d 626 (1988); *People v. Barbara*, 400 Mich 352, 225 N.W.2d 171 (1977). The Michigan Supreme Court's rationale was the lack of scientific acceptance of polygraph examination results and the risk that such evidence might be given disproportionate weight by the jury.

Although not admissible at trial, polygraph evidence can be used in Michigan in pre- and post-trial motions, including a motion for a new trial. *E.g., People v. McKinney*, 137 Mich App 110, 357 N.W.2d 825 (1984). Thus, persuasive polygraph evidence could be the basis of overturning a jury verdict.

Both the district court and the Sixth Circuit used the inadmissibility of the polygraph evidence at trial as reasons not to entertain the Petitioner's actual innocence claim.

The Sixth Circuit's rationale about actual innocence and admissibility is in direct conflict with the Second Circuit's decision in *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004). The Second Circuit based its decision on this Court's decision in *Schlup*. If the Second Circuit is correct, the Sixth Circuit's decision is not only in conflict with a decision from another Circuit but with a decision of this Court.

The Second Circuit was confronted with question similar to the question presented in the Petitioner's case, i.e. what evidence can be considered to establish factual innocence and an opportunity to use the gateway to get to the merits of the case.

The Second Circuit relied on this Court's decision in *Schlup* to answer this question. The Second Circuit opined that "[o]nce it has been determined that the new evidence is reliable, *Schlup* unequivocally requires that reviewing courts consider a petitioner's claim in light of the evidence in the record as a whole, ***including evidence that might have been inadmissible at trial.*** (Emphasis supplied). 391 F.3d at 162.

The Second Circuit went on to quote from *Schlup* where this Court relied on a passage from a University of Chicago Law Review Article authorized by Henry Friendly. 391 F.3d at 162. This article states in relevant part that "[i]n assessing the adequacy of petitioner's showing [of actual innocence]...the district court is not bound by the rules of admissibility that would govern on trial. 38 U.Chi.L.Rev. at 160.

The Second Circuit went on to state that "[a]s *Schlup* makes clear, the issue before such a court is not legal innocence but factual innocence. Integral to *Schlup's* holding is an express command to consider *all* evidence without regard to its admissibility..." 391 F.3d at 162 (Emphasis in the original).

It is the Petitioner's position that the Second Circuit is correct. For purposes of excusing procedural default because of actual innocence, the question is whether the criminal defendant is actually innocent. This Court made it clear in *Schlup* that this inquiry is not about legal niceties. Rather, the inquiry's focus must be factual.

Moreover, the outcome of the actual innocence inquiry is not a new trial. Rather, a criminal defendant who successfully invokes the doctrine is allowed to reach the distinct constitutional issue which would otherwise not be litigated. "Actual innocence" is not the basis for habeas relief. Rather, as this Court made clear in *Schlup,* it is a gateway to the underlying Consitutional issue. *Schlup v. Delo,* 513 U.S. 298, 315 (1995), quoting from *Herrera v. Collins,* 506 U.S. 390, 404 (1993).

The Petitioner submits that the Sixth Circuit's error about admissibility and the scope of evidence that can be considered during the actual innocence inquiry led that Court to a decision not to remand for a hearing about: 1) the reliability of the polygraph

evidence; and 2) on whether that evidence sufficiently established actual innocence so as to allow the Petitioner through the gateway to the merits of his constitutional claims.

The Petitioner is respectfully asking this Court to grant the Writ so that the Circuit split can be resolved and so that this Court can clarify the scope of reliable evidence that can be considered for purposes of the actual innocence analysis and the *Schlup* gateway.

4. Certiorari Should be Granted to Determine Whether the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution are Violated When a First Habeas Petitioner Seeking Review on Actual Innocence Grounds is Denied Relief for Procedural Reasons, Including a Refusal to Invoke the Doctrine of Equitable Tolling.

In *Duncan v. Walker*, 533 U.S. 167 (2001), Justice Stevens with Justice Souter concurring indicated that equitable tolling can be invoked on behalf of a habeas petitioner whose claims would otherwise be procedurally barred.

The Circuit Courts have generally agreed that equitable tolling can be invoked to allow an otherwise defaulted habeas petitioner to reach the merits of his or her claim. *E.g., Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001); *Miller v. New Jersey Department of Corrections*, 145 F.3d 616 (3d Cir. 1998); *Harris v. Hutchman*, 209 F.3d 325 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806 (5th Cir. 1998); *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002); *United States v. Marcello*, 212 F.3d 1005 (7th Cir. 2000); *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000); *Corgasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002); *Woodward v. Williams*, 263 F.3d 1135 (10th Cir. 2001); *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001); *United States v. Cicero*, 214 F.3d 199 (D.C. Cir. 2000).

Only the First Circuit has shown some reluctance to fully embrace the equitable tolling doctrine in the context of a habeas petitioner. *E.g. Brackett v. United States*, 270 F.3d 60 (1st Cir. 2001); *Delaney v. Matesanz*, 264 F.3d 7 (1st Cir. 2001).

The Circuits are also in general agreement that equitable tolling is to be invoked sparingly. The Circuits are not uniform about what

a habeas petitioner must do to successfully invoke the rule and remove the procedural bar. However, the procedures are generally framed in terms of judicially established factors.

Such an analysis was used by the Sixth Circuit in Petitioner's case. The Sixth Circuit uses a five-factor test originally announced in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). The five factors are: 1) lack of actual notice of filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the other party; and 5) a party's reasonableness in remaining ignorant of the filing requirement.

The Sixth Circuit uses a case-by-case analysis when determining what weight to give to each of the factors.

In the Petitioner's case, the Sixth Circuit concluded that the Petitioner did not qualify for equitable tolling because the Sixth Circuit's weighing of the five factors was unfavorable to the Petitioner.

The Sixth Circuit did not consider, however, whether there was a constitutional reason to invoke the equitable tolling doctrine.

The constitutional issue was suggested by Justice Blackmun, writing for himself and joined by Justices Stevens and Souter in *Herrera v. Collins*, 506 U.S. 390, 432, n.2 (1993) (Blackmun, J. dissenting). Justice Blackmun opined that the continued incarceration of an innocent person violates the Eight Amendment and, for that reason, such a person must be given recourse to the judicial system.

In *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997), the Second Circuit was considering the plight of a habeas petitioner who was claiming actual innocence of a firearms conviction following this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995).

The Second Circuit ultimately concluded that the AEDPA precluded relief, but that because of the actual innocence claim, the Petitioner should be allowed to reach the merits of his claims by way of a section 2241 habeas petition.

The panel reached this decision because it had constitutional concerns pursuant to the Fifth and Eighth Amendments.

The Eighth Amendment concern was based on Justice Blackmun's dissent in *Herrera.*

The Court went on to state that "[w]e also find an open and significant due process question. The Supreme Court has stated that a procedural limitation 'is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental' ", citing *Medina v. California,* 505 U.S. 437 (1992). 124 F.3d at 379.

Because the wrongful confinement of an innocent person is a fundamental concern, the Court concluded that "[i]t follows that serious due process questions would arise if Congress were to close off all avenues of redress in such cases, especially when the prisoner could not have raised his claim of innocence–which appears on the record–in an effective fashion at an earlier time". 124 F.3d at 379.

In *Triestman,* the defendant could not present his claim in an effective fashion because pre-*Bailey* authority did not give him a legally meritorious claim.

In the Petitioner's case, the Petitioner could not present his claim in an effective fashion until the science of polygraph examinations had evolved to the point where the scientific community would consider the results of such examinations to be reliable.

Because of these concerns, the Second Circuit formulated a remedy that would allow the defendant to have his issues heard on the merits.

Other Courts have expressed similar concerns.

For example, in *Miller v. Marr,* 141 F.3d 976 (10th Cir. 1998), the Court was considering whether the dismissal of the petition violated the Constitution's Suspension Clause.

The 10th Circuit considered this Court's jurisprudence and particularly *Lonchar v. Thomas,* 517 U.S. 314 (1996). In *Lonchar,* this Court distinguished between "first" habeas petitions and "successive" petitions. This Court stated that dismissal of a "first" habeas petition is a serious matter, "for that dismissal denies the petitioner

the protection of the Great Writ entirely, risking injury to an important interest in human liberty". 517 U.S. at 324.

The 10th Circuit also cited *Triestman* for the proposition that the limitation period set by Congress could raise serious constitutional questions which require that some relief be fashioned for the habeas petitioner.

In re Dorsanvil. 119 F.3d 245 (3d Cir. 1997) raised an issue which was very similar to the question raised in *Triestman,* i.e. can a habeas petitioner who is otherwise procedurally barred be given a remedy to challenge his conviction post-*Bailey.*

The Third Circuit crafted a remedy identical to the remedy crafted by the Second Circuit in *Triestman,* i.e. allowing the defendant to seek relief under section 2241 rather than section 2255.

The Third Circuit justified this decision by holding that the detention of a person for non-criminal conduct raised thorny constitutional issues. Those constitutional issues could be avoided by allowed the criminal defendant to seek relief.

In the instant case, the Petitioner is bringing his first habeas petition. Thus, as in *Lonchar,* the denial of relief would deprive the Petitioner altogether of access to the Great Writ.

The Petitioner is also arguing that he is actually innocent of the conviction that he seeks to challenge based on ineffective lawyering. As argued supra, the polygraph examination results provide a factual basis for the claim that the Petitioner did not assault the police officer with a firearm or with an intent to kill.

The Sixth Circuit precluded relief via equitable tolling by using judge-made principles that were not based on constitutional grounds.

The Petitioner respectfully submits that the Sixth Circuit erred and that judge-made principles are trumped by the constitutional concerns raised when a Petitioner claiming actual innocence is denied an opportunity to reach the merits of his constitutional claim.

The Petitioner further submits that the 2d and 9th Circuits had the right idea in *Whitely v. Senkowski,* 317 F.3d 223 (2d Cir. 2003) and *Majoy v. Roe,* 296 F.3d 770 (9th Cir. 2002). Specifically, a pris-

oner claiming actual innocence should be given an evidentiary hearing to determine whether that prisoner can sufficiently establish his actual innocence. If the prisoner is successful, then an appropriate remedy can be considered and fashioned.

In the Petitioner's case, both the district court and the Sixth Circuit refused requests for an evidentiary hearing and thus made critical decisions using a truncated record.

For these reasons, the Petitioner respectfully asks this Court to grant a Writ so that these important issues can be addressed.

CONCLUSION

As this Court has recognized in cases such as *Schlup v. Delo,* 513 U.S. 298 (1995) and *Herrera v. Collins,* 506 U.S. 390 (1993), cases involving claims of actual innocence are in a class of their own.

Each of the four issues raised by this Petition are inter-related because each issue is a component of the actual innocence analysis.

The Circuits are deeply divided about how this entire area of the law is to be treated. This division is important because the imprisonment of an actually innocent person goes to the very heart of the American system of justice. *E.g., Schlup v. Delo,* 513 U.S. 298 (1995); *Murray v. Carrier,* 477 U.S. 478 (1986).

The Petitioner is respectfully asking this Court to grant the Writ of Certiorari so that the Circuit splits can be resolved and so that the lower courts can be given additional guidance about the inter-relationship between the doctrine of actual innocence and the AEDPA's one-year limitations period for first petitions.

Respectfully submitted,

Frank Stanley
Counsel of Record
Frank Stanley, P.C.
200 North Division Avenue
Grand Rapids, MI 49503
(616) 459-8600
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Donald Paul BOLTON,
Petitioner-Appellant,

v.

Mary BERGHUIS,
Respondent-Appellee.
_____/

No. 05-1358

Jan. 13, 2006.
Rehearing En Banc Denied April 24, 2006.

BEFORE: CLAY and COOK, Circuit Judges, and OLIVER, District Judge.

OLIVER, District Judge:

Petitioner-Appellant Donald Bolton ("Appellant" or "Bolton") appeals the district court's dismissal of his petition for writ of habeas corpus. Bolton was convicted in 1993, for assault with intent to murder a police officer, and sentenced to life imprisonment. The district court dismissed the petition as untimely and refused to equitably toll the limitations period. For the reasons stated below, the judgment of the district court is affirmed.

I. FACTS AND PROCEDURAL HISTORY

A. State Conviction and Post Conviction Proceedings

A Michigan state court jury convicted Bolton of assault with intent to murder a police officer in 1993, along with six other crimes. Bolton was sentenced to life imprisonment. The Michigan Court of Appeals affirmed the conviction on July 25, 1995. *People v. Bolton,* No. 165706 (Mich. Ct.App. July 25, 1995). The Michigan Supreme Court denied leave to appeal on May 31, 1996. Bolton did not seek a writ of certiorari from the United States Supreme Court.

Over two and one-half years later, in January 1999, Bolton filed a post-conviction motion in the Michigan trial court, asserting ineffective assistance of his trial counsel. The basis for the claim was that Bolton's trial counsel was a volunteer member of the Kalamazoo County Sheriff's Mounted Division, and thus was under a conflict of interest in defending Bolton, who had been charged with assaulting a police officer. The post-conviction motion also alleged that Bolton's trial attorney failed to preserve evidence and voluntarily submitted unfavorable evidence which enhanced Bolton's sentence. The trial court denied Bolton's post-conviction motion on April 17, 2001. The Michigan Court of Appeals refused to grant leave for Bolton to appeal this decision on August 16, 2001, and the Michigan Supreme Court likewise denied Bolton's request on March 4, 2002. *People v. Bolton,* 465 Mich. 959, 640 N.W.2d 875 (2002).

B. Federal Habeas Petition

Bolton filed the instant habeas petition in the Western District of Michigan on ***545** April 3, 2002, less than thirty days after the conclusion of his state post-conviction proceedings. The district court restated the claims outlined in the habeas petition as follows:

The trial court's decision was contrary to clearly established federal law and/or an unreasonable application of federal law when the court concluded that the Petitioner was required to show an actual rather than a potential conflict of interest. The failure of the appellate courts to review also violated federal habeas standards.

Even if actual conflict is the proper standard, the trial judge misapplied clearly established federal law and/or made an unreasonable interpretation of that law by concluding that an actual conflict was not shown. The appellate courts also violated federal habeas standards when they refused discretionary review.

Even if there was no conflict of interest, it was a contrary application of clearly established federal law or an unreasonable application of that law to have denied relief because the record showed that the Petitioner had received constitutionally ineffective lawyering.

Respondent-Appellee Mary Berghuis ("Appellee" or "Berghuis") moved to dismiss the petition as untimely. In response, Bolton contended he had been unable to discover the factual predicate for the claim until shortly before he filed his motion for state post-conviction relief, and argued that the statute of limitations should be equitably tolled to permit a ruling on the merits of his petition. On April 7, 2003, the district court judge adopted the magistrate judge's report and recommendation that the motion to dismiss be denied without prejudice, pending a hearing on when Bolton had actually discovered the factual predicate for his ineffective assistance of counsel claim.

After a hearing, Appellee filed a second motion to dismiss the petition as untimely. In March 2005, the district judge adopted the magistrate judge's report and recommendation that the motion to dismiss be granted. The district court held that a diligent investigation of the facts underlying Bolton's ineffective assistance of counsel claims should have been completed no later than July 1995. Since the motion for state post-conviction relief was not filed until more than three years later, the district court found that the subsequent habeas petition was filed well beyond the one-year Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") statute of limitations. With respect to equitable tolling, the district court reviewed the five factors governing the doctrine, and concluded equitable tolling was not applicable. Finally, the court found that inasmuch as the basis for Bolton's actual innocence claim was polygraph evidence, such evidence was inadmissible in criminal trials in Michigan, and thus did not constitute admissible evidence of actual innocence.

The district court did grant a certificate of appealability for all grounds asserted, noting that "the procedural ruling, though resting on a solid legal basis, is objectively debatable because of the evolving law on the issues of equitable tolling and 'actual innocence.' "

II. STANDARD OF REVIEW

A district court's decision to deny habeas corpus relief is reviewed *de novo. E.g., Allen v. Yukins,* 366 F.3d 396, 399 (6th Cir.2004). Likewise, a district court's decision not to apply equitable tolling is reviewed *de novo. E.g., King v. Bell,* 378 F.3d 550, 553 (6th Cir.2004).

A district court's factual findings are reversible only for clear error. *Amadeo v. Zant,* 486 U.S. 214, 223, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

*546 III. LAW AND ANALYSIS

A. AEDPA Statute of Limitations

[1] Bolton contends the district court erred when it found his petition for habeas relief was untimely filed. Under 28 U.S.C. § 2244(d)(1), a prisoner may file a motion in federal court to vacate a state court conviction or sentence, but such a motion is subject to a one-year statute of limitation, which runs from the *latest* of:

(A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2241(d)(1). Additionally, the statute indicates that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2241(d)(2).

Bolton's conviction became final in 1996, when he did not timely seek a writ of certiorari in the United States Supreme Court to appeal the Michigan Supreme Court's decision denying him leave to appeal his conviction. Bolton did not file his federal habeas petition until 2002, nearly six years after his conviction became final. Thus, the petition was filed more than one year after the conviction became final, and is untimely under 28 U.S.C. § 2241(d)(1)(A).

Bolton argues that even if his petition was untimely under § 2241(d)(1)(A), the petition *was* timely under § 2241(d)(1)(D). Under this section, Bolton contends the one-year statute of limitations started in January 1999, the time he maintains he learned of the factual predicate for his claim and filed his state post-conviction motion. According to his calculation, the limitations period was stayed pending the state post-conviction proceedings, and his federal habeas filing less than thirty days from the end of the state proceedings was timely. Appellant contends that he "did not learn enough information to link the trial attorney's membership in the police organization to a conflict of interest" until 1999. Bolton does admit he first learned his trial lawyer was a volunteer sheriff in 1995. However, he argues that he did not pursue information about the conflict during his direct appeal, because such an issue could not be raised on direct appeal, and would be moot if the direct appeal were successful. Moreover, Bolton asserts that the fact his trial counsel was a volunteer sheriff was not evidence of a conflict of interest *per se*, and more investigation was necessary before he truly knew the factual predicate for the claim.

Appellee argues that Bolton knew the factual predicate for his ineffective assistance of counsel claim in July 1995, and that there was no reason for the forty-one month delay in filing for state post-conviction relief. The magistrate judge (and the district court) agreed, noting that:

Counsel has failed, however, to identify what additional facts were necessary to properly evaluate Petitioner's claim. Moreover, counsel has failed to identify *any* investigatory efforts that he undertook subsequent to July 1995. The Court is not suggesting that counsel did ***547** not undertake any such investigatory efforts, but it is relevant that counsel has failed to identify the nature of any such efforts or articulate their relevance to Petitioner's habeas claims.

The court went on to note the facts on the record indicating that Appellant and his family had learned of the potential conflict of interest in July 1995, and made the following factual finding:

in the absence of any evidence suggesting otherwise, the Court can envision no circumstance in which a *diligent* investigation of the facts underlying Petitioner's claims would have taken until January 1999 (as Petitioner asserts) or even January 30, 1998 (the latest date by which the limitations period could have started and still rendered timely Bolton's petition).

The district court's finding of fact is not clearly erroneous. There is no dispute that Appellant learned the underlying facts to support his ineffective assistance of counsel claim in July 1995, but made no filing in any court until July 1999, well after the one-year statute of limitations had expired. Therefore, Bolton's petition for a writ of habeas corpus is time-barred under the one-year AEDPA statute of limitations in 28 U.S.C. § 2241(d).

B. Equitable Tolling

[2] Bolton argues that even if his petition is time-barred under the AEDPA, the court should apply the doctrine of equitable tolling and hear his habeas claims on their merits. Appellant makes several overlapping arguments for equitable tolling, which essentially fall into three categories: (1) mandatory equitable tolling, pursuant to *Griffin v. Rogers*, 399 F.3d 626 (6th Cir.2005) and *Palmer v. Carlton*, 276 F.3d 777 (6th Cir.2002); (2) general principles of equitable tolling; and (3) equitable tolling due to a claim of actual innocence, pursuant to *Souter v. Jones*, 395 F.3d 577 (6th Cir.2005). For the reasons stated below, none of these arguments justify the application of equitable tolling in this case.

1. Mandatory Equitable Tolling

Appellant cites two recent Sixth Circuit cases, *Griffin* and *Palmer,* to support equitable tolling in his case. The court finds these cases inapplicable to the current case. *Griffin* and *Palmer* established a doctrine of "mandatory equitable tolling" under specific, narrow circumstances. They addressed a problem arising out of the Supreme Court's holding, in *Duncan v. Walker,* 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), that the AEDPA statute of limitations was not tolled during the pendency of federal habeas proceedings.[FN1] The *Duncan* holding, combined with the AEDPA's requirement that all habeas claims be exhausted by being presented to the state courts prior to filing for federal habeas relief, presented a problem for state prisoners with mixed petitions seeking federal habeas relief on some claims that had been exhausted in state court and some that had not been exhausted. In such circumstances, the federal court would dismiss the petition for containing unexhausted claims. By that time, however, the statute of limitations on the previously-exhausted claims may well have expired. On the other hand, if he filed the unexhausted claims in state court first, the statute of limitations would be tolled for those claims only, and he would likely be precluded by the statute of limitations from pursuing the previously-exhausted claims in federal court. *Griffin* and *Palmer* addressed this unique situation, and adopted:

***548** a stay-and-abeyance procedure, which effects a mandatory form of equitable tolling for the narrow group of cases in which a mixed petition is dismissed near or after the expiration of the AEDPA limitations period. Our Court has determined that if such a petitioner files any unexhausted claims in state court within 30 days of dismissal and re-files in federal court within 30 days of exhaustion, the re-filed petition will automatically be considered timely. If this mandatory equitable tolling does not apply, this Court may still equitably toll the limitations period based on the tradi-

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[FN1] In a concurring opinion in *Duncan,* Justice Stevens identified this problem and proposed the stay-and-abeyance procedure which was adopted by the Second Circuit in *Zarvela v. Artuz,* 254 F.3d 374 (2d.Cir.2001) and later by this court in *Palmer.*

tional equitable factors as outlined by this court in *Andrews v. Orr,* 851 F.2d 146 (6th Cir.1988).

Griffin, 399 F.3d at 631. In both *Griffin* and *Palmer,* however, the *original* date of filing in federal court for the stay-and-abeyance procedure was timely and within the one-year AEDPA statute of limitations. By their very terms, the *Palmer/Griffin* line of cases apply to a habeas petitioner who: (1) has a mixed case of some exhausted and some unexhausted claims; (2) files a timely petition in federal court; and (3) thereafter pursues his unexhausted claims in state court within 30 days and refiles in federal court within 30 days after exhaustion.

Appellant argues that if he had the benefit of the *Palmer* decision earlier, he would have filed his unexhausted claims in federal court in a timely fashion, obtained a stay, and proceeded to state court to exhaust the claims. However, assuming *Palmer* was the law in 1997, it would not have helped Appellant. First, *Palmer* applies only to mixed petitions, and Appellant's petition prior to the state post-conviction motion was not mixed; it contained only unexhausted claims. Even if the court read *Palmer* to apply to unmixed petitions, Appellant's petition was still not timely filed in the first case. Bolton's petition would have had to have been filed in state or federal court by August 31, 1997, to be timely. However, Appellant filed nothing regarding this claim in any court until 1999. While he contends that if *Palmer* had been the law at the time, he would have filed in 1997, there is nothing to suggest this is true. His stated reason for failure to file in 1997, which has already been rejected by the court, was that he had not learned of the factual predicate for his claim at that time. There is nothing in *Palmer* to suggest that claims should be filed prior to one year before the date by which the factual predicate for the claim could have been discovered by the exercise of due diligence. Mandatory equitable tolling, as contemplated by *Palmer* and *Griffin,* is strictly limited to protect a narrow class of habeas petitioners "whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." *Duncan,* 533 U.S. at 184, 121 S.Ct. 2120. Bolton is not within that class, and mandatory equitable tolling does not apply in Bolton's case.

2. Traditional Equitable Tolling: Five Factors

While Appellant conflates the *Palmer/ Griffin* mandatory equitable tolling discussed above with the traditional five-factor equitable tolling analysis used by the Sixth Circuit, the court evaluates the traditional equitable tolling analysis separately. The factors a court should examine in determining whether equitable tolling applies to waive the AEDPA statute of limitations are:

(1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

***549** *E.g., Andrews v. Orr,* 851 F.2d 146, 151 (6th Cir.1988). Appellant's argument regarding knowledge of the filing requirement in elements (1), (2), and (5) is based entirely on the *Palmer/ Griffin* line of cases discussed above. For the reasons discussed above, these factors do not weigh in favor of equitable tolling. Regardless of *Palmer,* Bolton knew or should have known that he had one year from the date his conviction became final to pursue habeas relief. Indeed, he does not contend that he did not know of the AEDPA's filing requirements. Yet, knowing of the underlying facts supporting his ineffective assistance of counsel claim, he did nothing to pursue his claim. Inasmuch as his only argument for lack of notice is based on *Palmer,* elements (1), (2), and (5) counsel against equitable tolling.

In addition, Appellant's argument regarding his diligence in pursuing his rights is also flawed, as discussed above. The district court held as a factual matter that Appellant had not been diligent from 1995 to 1999 in pursuing his rights. Additionally, Appellee cites *Jurado v. Burt,* 337 F.3d 638 (6th Cir.2003), in which the Sixth Circuit performed a diligence analysis in a similar context. In *Jurado,* a petitioner took nineteen months to file his federal habeas claim, and urged the court to apply equitable tolling to excuse the delay. The court evaluated the diligence of counsel in pursuing petitioner's rights, holding that "AEDPA does not convey a right to an extended delay while a habeas petitioner gathers every possible scrap of evidence that might support his claim. *See Flanagan v.*

Johnson, 154 F.3d 196, 199 (5th Cir.1998). Neither does the doctrine of equitable tolling grant such a right." *Jurado*, 337 F.3d at 644. The court finds *Jurado* persuasive. The district court held an evidentiary hearing to determine when Bolton learned the underlying factual predicate for his habeas claim, and correctly concluded that "these facts were either (a) known to counsel in July 1995, or (b) through the exercise of due diligence could have been ascertained soon thereafter. Counsel has advanced neither argument nor evidence suggesting otherwise." Thus, Appellant knew of the underlying factual predicate for his habeas claim in July 1995, and there is no right to an extended delay to gather every possible additional detail to support the habeas claim. The third factor also counsels against equitable tolling. For these reasons, the court declines to apply equitable tolling.

3. Equitable Tolling for Actual Innocence

The Sixth Circuit recently codified that equitable tolling will apply to claims of actual innocence by otherwise time-barred habeas petitioners. *Souter v. Jones*, 395 F.3d 577 (6th Cir.2005). *Souter*, relying on *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), held:

> where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims.

395 F.3d at 602. Actual innocence must be proven by " 'new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial.' " *Id.* at 590 (quoting *Schlup*, 513 U.S. at 324, 115 S.Ct. 851).

In the instant case, Appellant contends that polygraph test results support his innocence. However, polygraph examinations are not admissible evidence in Michigan state courts, which have held that they are not scientifically valid and thus not reliable. E.g., ***550** *People v. Ray*, 431 Mich. 260, 430 N.W.2d 626, 628 (1988). While Appellant spends substantial pages of his brief arguing that New Mexico and Georgia have recently changed course and admit-

ted polygraph evidence, as of this date, Michigan has not done so, and has shown no indication of doing so. It is not for this court to speculate on what Michigan may do in the future, or when it may do so. Furthermore, the admissibility of polygraph evidence is a state law issue, and thus not an issue of clearly established federal law. No federal court has held that as a constitutional matter, polygraph evidence must be admitted in any criminal trial, or that polygraph evidence is reliable. *See United States v. Scheffer,* 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (finding there is no consensus among jurisdictions that polygraph evidence is reliable). Therefore, since any polygraph results would not be admissible or reliable evidence, the actual innocence exception to the statute of limitations contemplated in *Souter v. Jones* is inapplicable here. Appellant has not shown admissible, reliable evidence of his actual innocence. Consequently, the court affirms the district court's denial of his claim for equitable tolling on this ground.

Even if the court assumed that the polygraph results were reliable evidence[FN2] the polygraph test results do not support a claim of actual innocence. If believed, the polygraph evidence only suggests that Appellant did not shoot or attempt to shoot Officer Briney, did not hold a gun to Officer Briney's head, and did not fire any shots while in the police cruiser. The evidence does not contradict Officer Briney's testimony that Appellant shouted "kill him, kill the fucking pig" to his cousin-accomplice. Moreover, Appellant does not contest that he physically attacked Officer Briney, that he obtained Officer Briney's gun during the course of the incident, or that he fired his own gun while fleeing the scene. In light of these uncontested facts, a reasonable jury could easily find that Appellant intended to murder Officer Briney. Therefore, Appellant has not established a claim of actual innocence.

[FN2] The Supreme Court, in Schlup v. Delo, 513 U.S. 298, 327-28, 115 S.Ct. 851 counseled:

In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the Carrier standard, we believe that Judge Friendly's description of the inquiry is appropriate: The habeas court must make

IV. CONCLUSION

Bolton's petition for a writ of habeas corpus was untimely under the AEDPA, and Bolton has failed to set forth a justification to support equitable tolling. The decision of the district court dismissing Bolton's petition is AFFIRMED.

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its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

APPENDIX B

28 U.S.C. 2244(d)(1)

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a Sate court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly retroactive by the Supreme Court or made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

APPENDIX C

28 U.S.C. 2254(a) and (d)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

APPENDIX D

28 U.S.C. 2244(b)(2)(B)(ii) states that a second or successive habeas corpus petition can be considered if:

> The facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

APPENDIX E

The Fifth Amendment of the United States Constitution states in relevant part:

> No person...shall be deprived of life, liberty, or property without due process of law.

APPENDIX F

The Eighth Amendment of the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX G

The Fourteenth Amendment of the United States Constitution, Section 1 states in relevant part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Donald Paul BOLTON,
Petitioner-Appellant,

v.

Mary BERGHUIS,
Respondent-Appellee.
_____/

Case No. 1:02-CV-220

AFFIDAVIT OF CHARLES R. HONTS, PH. D.

I, Charles R. Honts, being sworn upon my oath, do hereby affirm the following:

1. I am a United States citizen and am over the age of eighteen (18) years old. I am a Professor of Psychology at Boise State University, 1910 University Drive, Boise, Idaho 83725. I hold a Ph. D. degree in Experimental Psychology with a concentration on human psychophysiology. My central area of study and research is in credibility assessment and in polygraph testing in particular. A copy of my Curriculum Vitae is provided with this Affidavit as Attachment A. That Curriculum Vitae accurately provides a list of my education, training, publications, presentations, employment history, and a history of my appearances as an expert witness.

2. I was contacted by the attorney representing Donald Bolton and asked to review the results of a polygraph examination taken by Donald Bolton on 4 September 2003. In the course of conducting

that review, I considered the report of James A. Straub, the polygrapher who examined Bolton; the computer-generated charts; and the computer-generated charts of Bolton's polygraph exam. This material is the kind of information an expert in my field normally reviews. The information provided is adequate for me to form a reliable opinion regarding Bolton's polygraph examination. My initial review of the materials indicated that they were adequate to access the reliability of the 4 September 2003 examination.

3. The questions used in the examination were in the form of a comparison question test. The comparison question test is the standard forensic test under the standards of the polygraph profession. Similarly, the charts generated in the examination were of high quality and clearly within the standards of the polygraph profession.

4. There were four relevant questions in the 4 September 2003 polygraph examination of Bolton: (R2) Did you hold a gun to officer Briney's head? (Indicated Answer "No"); (R3) Did you try to shoot officer Briney? (Indicated Answer "No"); (R4) Did you attempt to shoot officer Briney? (Indicated Answer "No"); and (R5) Did you shoot officer Briney? (Indicated Answer "No").

5. I evaluated the polygraph charts from 4 September 2003 examination of Bolton using the scoring system developed and scientifically validated at the University of Utah[1]. Although there are several scoring systems in use in the polygraph field, the Utah System is the one with the most scientific validation[2].

6. My Utah Scoring System score for this examination was +18. In the Utah Scoring System, scores of -6 or less are considered as indicative of deception to the relevant questions of the examination. Scores between -6 and +6 are considered inconclusive. Scores of +6 or more are considered as indicative of truthfulness. Mr. Bolton's score on the 4 September 2003 polygraph examination conducted by James A Straub clearly exceeds the criterion for a conclusion of truthfulness.

7. Based on my evaluation of the materials from the examination and on my numerical evaluation of the charts, it is my opinion that

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[1] Brian G. Bell, David C. Raskin, Charles R. Honts, and John C. Kircher, *The Utah Numerical Scoring System* 28 POLYGRAPH 1 (1999).

Mr. Bolton was telling the truth when he answered the relevant questions of that examination. That opinion is held to a reasonable degree of scientific certainty.

THE ADMISSIBILITY OF POLYGRAPH RESULTS

The remainder of my affidavit relates to the admissibility of polygraph results, with a particular focus on the criteria established in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Each of the five *Daubert* criteria is set out in bold.

8. Polygraph tests have gained general acceptance in the scientific fields of psychology and psychophysiology and in the areas of those disciplines devoted to credibility assessment. Psychophysiological credibility assessment, commonly known as polygraph testing, has long passed the experimental stage.

9. In practice, virtually all polygraph instruments used for psychophysiological credibility assessment record measures from at least three physiological systems that are controlled by the autonomic nervous system. Recordings are usually made of palmar sweating (commonly known as the galvanic skin response), relative blood pressure (obtained from an inflated cuff on the upper arm), and respiration (obtained from volumetric sensors placed around the chest and/or abdomen). State of the science field polygraph instruments also make measurements of peripheral vasomotor activity and monitor the subject's movements.

10. **The basis of polygraphy, also known as psychophysiological credibility assessment and the psychophysiological detection of deception, is a scientific theory that can be tested with the methods of science (falsified).** To wit, any conscious effort at deception by a rational individual causes involuntary and uncontrollable physiological responses that may include measurable reactions in blood pressure, peripheral pulse-amplitude, breathing and electrodermal response. The various techniques used in polygraphy for the detection of deception are also capable of falsification through the methods of science. The most commonly used tech-

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[2] See the review by David C. Raskin and Charles R. Honts, *The Comparison Question Test* (pp. 1-47) in Murray Kleiner (Ed.) HANDBOOK OF POLYGRAPH TESTING (2002).

niques for the psychophysiological detection of deception are comparison question tests (CQT). The theory of these comparison question tests is as follows: The CQT assesses a person's credibility by looking for a differential reaction between two types of questions. The first type of question is known as a relevant question. Relevant questions are direct accusatory questions that address the issue under investigation (e.g., Did you shoot John Doe?) Comparison questions are ambiguous questions to which the subject is maneuvered into answering, "No" (e.g., Before 1994, did you ever do anything that was dishonest, illegal or immoral? Some versions of the CQT direct the subject to answer with a lie. The rationale of the comparison question test predicts that guilty subjects will produce larger physiological responses to the relevant questions to which they know they are deceptive, than to the relatively unimportant comparison questions. Innocent subjects are expected to produce larger physiological responses to the comparison questions, to which they are assumed to be either deceptive, or at least uncertain of the veracity of their answer, than to the truthfully answered relevant questions.)

11. **The basic theory of the psychophysiological detection of deception and the various techniques used for the detection of deception were subjected to numerous scientific tests during the past 30 years.**

12. **There are numerous studies published in peer-reviewed scientific journals that test the theory of the psychophysiological detection of deception and provide estimates of the error rates for comparison question tests.** Science has approached the problem of assessing the accuracy of comparison question tests in two venues, laboratory studies and field studies.

12.1. Laboratory research has traditionally been an attractive alternative because the scientist can control the environment. Moreover, with regard to credibility assessment studies, the scientist can know with certainty who is telling the truth and who is lying by randomly assigning subjects conditions. Laboratory research on credibility assessment has typically made subjects deceivers by having them commit a mock crime (e.g. "steal" a watch from an office), and then instructing them to lie about it during a subsequent test. From a scientific viewpoint, random assignment to conditions is highly desirable because it controls for the

influence of extraneous variables that might confound the results of the experiment.[3] Although, laboratory research in general, and credibility assessment in particular, might be criticized for a lack of realism. A lack of realism might, but not necessarily, limit the ability of scientists to apply the results of the laboratory to real-world settings.[4] Some scientists who conduct research on psychophysiological credibility assessment have attempted to overcome this limitation by trying to make the laboratory simulations as realistic as possible.[5] The goal of making laboratory simulations as realistic as possible would seem to be reasonable and appears to provide results that have applicability to field situations. A recent survey of the relevant scientific community indicated that the majority of scientists believe that laboratory studies are a useful tool for policy makers to use in assessing the validity of comparison questions tests[6].

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[3] See the extensive discussion of the advantages of random assignment to conditions in T. D. Cook and D. T. Campbell, QUASI-EXPERIMENTATION: DESIGN AND ANALYSIS ISSUES FOR FIELD SETTINGS (1979).

[4] Id. Also see, Craig A. Anderson, James J. Lindsay, and Brad J. Bushman, *Research In The Psychological Laboratory: Truth or Triviality?*, 8, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, 3, (1999). Anderson et al., conclude the following: Correspondence between lab- and field-based effect sizes of conceptually similar independent and dependent variables was considerable. In brief, the psychological laboratory has generally produced truths, rather than trivialities.

[5] See John C. Kircher, Steven W. Horowitz, & David C. Raskin, *Meta-Analysis Of Mock Crime Studies Of The Control Question Polygraph Technique*, 12 LAW AND HUMAN BEHAVIOR, 79 (1988). Three factors have been identified as contributing to the realism of laboratory research on the CQT. 1) Use of realistic subject populations. College student subjects have been associated with low accuracy rates, while more representative subject samples from prison populations and the community have been associated with higher accuracy rates. 2) Use of representative field examiners, techniques, and scoring methods. Those laboratory studies that have used field polygraph examiners, and field techniques for administering and scoring the examinations have produced higher accuracy rates. 3) The use of incentives associated with the outcome of the examination. Usually, subjects are paid money if they pass the examination, although other studies have used negative events associated with failing the test. Studies with explicit motivations associated with the outcome of the test have produced higher accuracy rates.

[6] Charles R. Honts, Steven Thurber, Dario Cvencek, & Wendy Alloway. *General Acceptance Of The Polygraph By The Scientific Community: Two Surveys of Professional Attitudes.* Paper presented at the American Psychology-Law Society biennial meeting, Austin, Texas (2002) [hereinafter, The Honts Survey.]

12.2. The alternative approach to studying psychophysiological credibility assessment is to conduct field studies. In this approach, polygraph tests conducted in actual cases are examined. Although field studies can be the subject of numerous problems,[7] the chief problem in detection of deception studies lies in unambiguously determining ground truth. That is, some method that is independent of the outcome of the test is needed for determining who is in fact telling the truth. Although a number of approaches have been taken, it is generally agreed that confessions are the best available criterion for ground truth in these studies.[8] It now seems to be generally agreed upon by persons doing field research in this area that useful field studies of the psychophysiological credibility assessment tests should have all of the following characteristics:[9]

12.2.1. Subjects should be sampled from the actual population of subjects in which the researcher is interested. If the researcher wants to make inferences about tests conducted on criminal suspects, then criminal suspects should be the subjects who are studied.

12.2.2. Subjects should be sampled by some random process. Cases must be accepted into the study without reference to either the accuracy of the original outcome or to the quality of the physiological recordings.

12.2.3. The resulting physiological data must be evaluated by persons trained and experienced in the field scoring techniques about which inferential statements are to be made. Independent evaluations by persons who have

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[7] Supra Note 3 (Cook and Campbell).

[8] The problems associated with field research in this area are discussed in detail by David C. Raskin, *Polygraph Techniques for the Detection of Deception*, in David C. Raskin (Ed.) PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE, 276 (1989) at 264.

[9] See the recent review by Charles R. Honts, David C. Raskin, and John C. Kircher, *The Scientific Status of Research on Polygraph Techniques: The Case For Polygraph Tests*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (Volume 2) D. L. Faigman, D. Kaye, M. J. Saks, & J. Sanders (Eds. 2002).

access to only the physiological data are useful for evaluating the information content of those data. However, the decisions rendered by the original examiners probably provide a better estimate of the accuracy of polygraph techniques as they are actually employed in the field.

12.2.4. The credibility of the subject must be determined by information that is independent of the specific test. Confessions substantiated by physical evidence are presently the best criterion available.

13. A Committee of Concerned Social Scientists field a Brief for *Amicus Curiae* with the Supreme Court of the United States in the case of *United States v. Scheffer.*[10] **They estimated that the error rate for polygraph tests by examining high quality laboratory and field studies.** They found eight high quality laboratory studies of the CQT.[11] The results of those laboratory studies are illustrated in Table 1. The high quality laboratory studies indicate that the CQT is a very accurate discriminator of truth tellers and deceivers. Over all of the studies, the CQT correctly classified

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[10] Brief of the Committee of Concerned Social Scientists as Amicus Curiae in Support of the Respondent in *United States v. Scheffer,* 44, M.J. 4442 (1996) [hereinafter Committee].

[11] Lawrence N. Driscoll, et al., *The Validity of the Positive Control Physiological Detection of Deception Technique,* 15 J. POLICE SCI. ADMIN. 46 (1987); Avital Ginton et al., *A Method for Evaluating the Use of the Polygraph in a Real-Live Situation,* 67 J. APPLIED PSYCHOL. 131 (1982); Charles R. Honts et al., *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests,* 79 J. APPLIED PSYCHOL. 252 (1994); Steven W. Horowitz, John C. Kircher, Charles R. Honts, and David C. Raskin, *The Role of Comparison Questions in Physiological Detection of Deception,* 34 Psychophysiology 108 (1997); John C. Kircher and David C. Raskin, *Human Versus Computerized Evaluations of Polygraph Data in a Laboratory Setting,* 73 J. APPLIED PSYCHOL. 291 (1988); John A. Podlesny & David C. Raskin, *Effectiveness of Techniques and Physiological Measures in a the Detection of Deception,* 15 PSYCHOPHYSIOLOGY, 344 (1978); John A. Podlesny & Connie M. Truslow, *Validity of an Expanded-Issue (Modified General Question) Polygraph Technique in a Simulated Distributed-Crime-Roles Context,* 78 J. APPLIED PSYCHOL. 788 (1993); David C. Raskin & Robert D. Hare, *Psychopathy and Detection of Deception in a Prison Population,* 15 PSYCHOPHYSIOLOGY, 126 (1978); Louis I. Rovner, *The accuracy of physiological detection of deception for subjects with prior knowledge,* 15 POLYGRAPH 1 (1986).

about 91 percent[12] of the subjects and produced approximately equal numbers of false positive and false negative errors.

Table 1.
The Results of High Quality Laboratory Studies of the Comparison Question Test

	Guilty				Innocent			
Study	n	% Correct	% Wrong	% Inc	n	% Correct	% Wrong	% Inc
Driscoll et al. (1987)[a]	20	90	0	10	20	90	0	10
Ginton et al. (1984)	2	100	0	0	13	85	15	0
Honts, et al. (1994)[a]	20	70	20	10	20	75	10	15
Horowitz, et al. (1994)[b]	15	53	20	27	15	80	13	7
Kircher & Raskin (1988)	50	88	6	6	50	86	6	8
Podlesny & Raskin (1978)	20	70	15	15	20	90	5	5
Podlesny & Truslow (1993)	72	69	13	18	24	75	4	21
Raskin & Hare (1978)	24	88	0	12	24	88	8	4
Rovner et al. (1979)a	24	88	0	12	24	88	8	4
Means	**247**	**80**	**8**	**12**	**210**	**84**	**8**	**8**
Percent Decisions		**90**	**10**			**92**	**8**	

[a]Countermeasure subjects excluded.
[b]Traditional comparison question subjects only.

14. The Committee of Concerned Social Scientists[13] also examined the available field studies of the CQT. They were able to find four field studies[14] that met the criteria for meaningful field studies

[13] Supra Note 10 (Committee)

[14] Charles R. Honts, *Criterion Development And Validity Of The Control Question Test In Field Application*, THE JOURNAL OF GENERAL PSYCHOLOGY, 509, 123 (1996); Charles R. Honts & David C. Raskin, *A Field Study of the Directed Lie Control Question*, 16 J. POLICE SCI. ADMIN. 56 (1988); Christopher J. Patrick & William G. Iacono, *Validity of the Control Question Polygraph Test: The Problem of Sampling Bias*, 76, J. APPLIED PSYCHOL. 229 (1991); David C. Raskin et al., A STUDY OF THE VALIDITY OF POLYGRAPH EXAMINATIONS IN CRIMINAL INVESTIGATIONS, Final Report to the National Institute of Justice, Grant Number 85-IJ-CX-0400, Department of Psychology, Salt Lake City, University of Utah. (1988).

of psychophysiological credibility assessment tests. The results of the independent evaluations for those studies are illustrated in Table 2. Overall, the independent evaluations of the field studies produce results that are quite similar to the results of the high quality laboratory studies. The average accuracy of field decisions for the CQT was 90.5 percent.[15] However, with the field studies nearly all of the errors made by the CQT were false positive errors.[16]

Table 2.
The Accuracy of Independent Evaluations in High Quality Field Studies of the Comparison Question Test

		Guilty				Innocent		
Study	n	% Correct	% Wrong	% Inc	n	% Correct	% Wrong	% Inc
Honts (1996)[a]	7	100	0	0	6	83	0	17
Honts & Raskin (1988)[b]	12	92	0	8	13	62	15	23
Patrick & Iacono (1991)[c]	52	92	2	6	37	30	24	46
Raskin et al. (1989)[d]	37	73	0	27	26	61	8	31
Means	**108**	**89**	**1**	**10**	**82**	**59**	**12**	**29**
Percent Decisions		**98**	**2**			**75**	**25**	

[a]Sub-group of subjects confirmed by confession and evidence.
[b]Decision based only on comparisons to traditional comparison questions.
[c]Results from the mean blind rescoring of the cases "verified with maximum certainty" (p. 235)
[d]These results are from an independent evaluation of the "pure verification" cases.

15. Although the high quality field studies indicate a high accuracy

[15] The results excluded inconclusive outcomes as they are not decisions.

[16] See the discussion in Honts et al., supra note 9 and in Honts, supra note 14, concerning the performance of original examiners in these studies. They note that the original examiners in the Patrick and Iacono study perform at a much higher level than the independent evaluators. This finding was not representative of the other three field studies. The original examiners in the Patrick and Iacono study, supra note 14, correctly classified 100% of the guilty and 90% of the innocent subjects. This performance is quite similar to the original examiners in the Honts (1996) field study, supra note 14, who were from the same law enforcement agency. Honts et al., supra note 9, and Honts, supra note 14, have argued that the independent evaluator data from the Patrick and Iacono study should be views as an anomaly. If the Patrick and Iacono data are excluded, the field estimate of the accuracy of CQT decisions is 95.5%, Honts et al., supra note 9.

rate for CQT, all of the data represented in Table 2 were derived from independent evaluations of the physiological data. This is a desirable practice from a scientific viewpoint, because it eliminates possible contamination (e.g. knowledge of the case facts, and the overt behaviors of the subject during the examination) that might be included in the decisions of the original examiners. However, independent evaluators rarely offer testimony in legal proceedings. It is usually the original examiner who gives testimony. Thus, accuracy rates based on the decisions of independent evaluators may not be the true figure of merit for legal proceedings. The Committee of Concerned Social Scientists summarized the data from the original examiners in the studies reported in Table 2, and for two additional studies that are often cited by critics of the CQT[17]. The data for the original examiners are presented in Table 3. These data clearly indicate that the original examiners are even more accurate than the independent evaluators.

Table 3.

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[17] Those two studies are, Benjamin Kleinmuntz and Julian J. Szucko, *A Field Study Of The Fallibility Of Polygraphic Lie Detection*, 308, NATURE, 449 (1984), Frank Horvath, *The Effects Of Selected Variables On Interpretation Of Polygraph Records*, 62, JOURNAL OF APPLIED PSYCHOLOGY 127 (1977). Neither of these studies meets the generally accepted requirements for useful field studies but nevertheless they are frequently cited by critics of the CQT as evidence that the CQT is not accurate. The study reported by Benjamin Kleinmuntz and Julian J. Szucko, *A Field Study Of The Fallibility Of Polygraphic Lie Detection*, 308, NATURE, 449 (1984) fails to meet the criteria for a useful field study because: The subjects were employees who were forced to take tests as part of their employment, not criminal suspects. The case selection method was not specified. Students at a polygraph school that does not teach blind chart evaluation evaluated the data. Moreover, those students were given only one ninth of the usual amount of data collected in a polygraph examination and were forced to use a rating scale with which they were not familiar. The study reported by Frank Horvath, *The Effects Of Selected Variables On Interpretation Of Polygraph Records*, 62, JOURNAL OF APPLIED PSYCHOLOGY 127 (1977), also fails to meet the criteria for a useful study because: About half of the innocent subjects were victims of violent crime, not suspects. Virtually all of the false positive errors in that study were with innocent victims, not innocent suspects. In addition, the persons doing the blind evaluations were all trained at a polygraph school that does not teach blind chart evaluation. Finally, cases were not selected at random. Some cases where excluded from the study because of the nature of their charts. An interesting fact that critics almost never mentioned is that the decisions by the original examiners in the Horvath Study were 100% correct. Also see the discussion in David C. Raskin, *Methodological Issues In Estimating Polygraph Accuracy In Field Applications*, 19, CANADIAN JOURNAL OF BEHAVIORAL SCIENCE 389 (1987).

Percent Correct Decisions by Original Examiners in Field Cases

Study	Guilty	Innocent
Horvath (1997)	100	100
Honts & Raskin (1988)	100	92
Kleinmuntz & Szucko (1984)	100	100
Raskin, Kircher, Honts & Horowitz (1988)[a]	96	95
Patrick & Iacono (1991)	90	100
Honts (1996)[b]	100	94
Means	**98**	**97**

[a]Cases where all questions were confirmed.
[b]Includes all cases with some confirmation.

16. The scientific data concerning the validity (the accuracy and error rate) of the polygraph can be summarized as follows: High quality scientific research from the laboratory and the field converge on the conclusion that, when properly conducted, the CQT is a highly accurate discriminator of truth tellers and deceivers. The research results converge on an accuracy estimate that exceeds 90 percent. Moreover, original examiners, who are most likely to offer testimony, produce even higher estimates of accuracy. There may be a tendency for the CQT to produce more false positive than false negative errors, but this trend in the current literature is not particularly strong.[18] Moreover, no tendency toward false positive errors is seen in the decisions of the original examiners. The scientific validity of a properly administered polygraph examination in a real life case compares favorably with such other forms of scientific evidence as x-ray films, electrocardiograms, fiber analysis, ballistics comparison tests, blood analysis, and is far more reliable than other forms of expert testimony (e.g., psychiatric and psychological opinions as to sanity, diminished capacity, dangerousness and many of the post traumatic stress/recovered memory syndromes)[19].

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[18] This is especially true if the outlying data produced by the Patrick and Iacono study, supra note 14, are discounted.

[19] See the discussion in, Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes And Challenges*, 16, L. & HUM. BEHAV. 357 (1992), and Charles R. Honts & Bruce D. Quick, The polygraph in 1995: Progress in science and law, NORTH DAKOTA LAW REVIEW, 71 (1995).

17. There are several concerns that are commonly raised about issues that might increase the error rate associated with polygraph tests.

17.1. Countermeasures are anything that a subject might do in order to distort of defeat a psychophysiological credibility assessment test[20]. Detailed reviews of the scientific literature on countermeasures are available in a number of locations.[21] This research leads to several conclusions. First, there is no credible scientific evidence that drugs or other countermeasures designed to affect the general state of the subject are effective against the CQT.[22] However, some laboratory studies have indicated that training in specific point countermeasures designed to increase responding to comparison questions are effective in producing a substantial number of false negative outcomes when used against both the comparison question and the concealed knowledge tests.[23] Nevertheless, it is also important to note that training in the countermeasures appears critical to their effectiveness. Subjects who are only given the information[24], or who attempt spontaneous

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[20] Charles R. Honts, & Mary Amato (2002). *Countermeasures,* in Murray Kleiner (Ed.), HANDBOOK OF POLYGRAPH TESTING. London: Academic (pp. 251-264) (2002).

[21] e.g., Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes And Challenges,* 16, L. & HUM. BEHAV. 357 (1992) at 373; Charles R. Honts, Interpreting research on polygraph countermeasures. 15 J. Police Science and Administration 204 (1987); Charles R. Honts, et al., *Mental And Physical Countermeasures Reduce The Accuracy Of Polygraph Tests.* 79, JOURNAL OF APPLIED PSYCHOLOGY, 252 (1994), Honts et al. supra note 9.

[22] Id., Honts (1987); Honts et al. supra note 9.

[23] See e.g., Charles R. Honts, David C. Raskin, & John C. Kircher, *Mental And Physical Countermeasures Reduce The Accuracy Of Polygraph Tests.* 79, JOURNAL OF APPLIED PSYCHOLOGY, 252 (1994).

[24] Rovner (1986), supra note 11; Wendy Alloway & Charles R. Honts, *An Information Countermeasure Has No Effect On The Validity Of The Test For Espionage And Sabotage* (TES). Paper presented at the annual meeting of the Rocky Mountain Psychological Association, Park City, Utah (2002, April).

countermeasures[25] are unable to achieve effects, and the required training is hopefully difficult to obtain.[26] Honts and Perry not that while there are no easy answers to the problem of trained countermeasures, it appears that computerized analysis of the physiological records substantially reduces the false negative rate attributable to countermeasure use.[27] Users of polygraph information should weigh the usefulness of the polygraph outcome against the probability that the subject received sophisticated training in the use of countermeasures. In this regard, the polygraph test is no different than any other psychological test where the scoring key could be discovered and unethically revealed to the person being tested.

17.2. The popular notion that a "pathological," "psychopathic," or "criminally hardened" liar cannot be tested successfully with the polygraph has no basis in scientific fact. "Psychopathic" or "criminally hardened" liars, including those clinically diagnosed with Antisocial Personality Disorder respond quite satisfactorily when attempting deception and are as easily detected in their deception as normals.[28]

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[25] Charles R. Honts, David C. Raskin, John C. Kircher, & Robert L. Hodes, *Effects Of Spontaneous Countermeasures On The Physiological Detection Of Deception*, 16, JOURNAL OF POLICE SCIENCE AND ADMINISTRATION, 91 (1988); Charles R. Honts, Susan Amato & Anne K. Gordon, *Effects Of Spontaneous Countermeasures Used Against The Comparison Question Test*, 30 POLYGRAPH, 1 (2001); Kimberly Otter-Henderson, Charles R. Honts, & Susan Amato, *Spontaneous Countermeasures During Polygraph Examinations: An Apparent Exercise In Futility*, 31 POLYGRAPH, 9 (2002). These three studies produce very similar results that can be summarized as follows: spontaneous countermeasure attempts were common, even among innocent subjects. However, spontaneous countermeasures had no effects on the test outcomes of guilty subjects, but lowered (shifted the average score in the deceptive direction) the scores of innocent subjects.

[26] Honts and Perry, supra note 21 at 376.

[27] Id at 374; also see Honts et al., (1994) supra note 23.

[28] Numerous studies have addressed the question of whether psychopaths can beat the polygraph, e.g. Raskin and Hare, supra note 11; also see the analysis and review by Charles R. Honts, David C. Raskin, & John C. Kircher, 19, *Effects Of Socialization On The Physiological Detection Of Deception*, JOURNAL OF RESEARCH IN PERSONALITY, 373 (1985).

17.3. Psychotic persons may not be suitable subjects for polygraphic testing, but only when they experience psychotic episodes, delusions or hallucinations during the examination. Then, the subject might sincerely believe such delusions to be fact. Persons psychotic to this degree would be recognized as such by any reasonable person.

17.4. There are no known traits of personality or personality disorders that would allow or predispose a deceptive person to pass a properly conducted polygraph examination.[29]

18. **The notion that the polygraph is generally accepted in the relevant scientific community as a valid test is supported by several sources of evidence:** surveys, the existence of peer-reviewed publications, the proliferation of peer-reviewed scientific publications and journals, and a recent report by the National Research Council of the National Academy of Sciences.

18.1. There are four surveys that directly address the general acceptance issue.[30] All of those surveys have included members of the Society for Psychophysiological Research (SPR). The SPR is a professional society of scientists (Ph.D. and M.D.) who study how the mind and body interact. Thus, the Society for Psychophysiological Research is an appropriate scientific community for assessing general acceptance.

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[29] Id., Honts et al.; also see Charles R. Honts, David C. Raskin, & John C. Kircher. (1986, October). *Individual Differences And The Physiological Detection Of Deception.* Paper presented at the annual meeting of the Society for Psychophysiological Research, Montreal, Canada.

[30] The Gallup Organization, *Survey Of The Members Of The Society For Psychophysiological Research Concerning Their Opinions Of Polygraph Test Interpretations,* 13, POLYGRAPH, 153 (1984) [hereinafter, The Gallup Survey]; Susan L. Amato, A SURVEY OF THE MEMBERS OF THE SOCIETY FOR PSYCHOPHYSIOLOGICAL RESEARCH REGARDING THE POLYGRAPH: OPINIONS AND IMPLICATIONS. Unpublished Master's Thesis, the University of North Dakota, Grand Forks (1993) [hereinafter, The Amato Survey]; William Iacono and David Lykken partially presented in *The Scientific Status of Research On Polygraph Techniques: The Case For Polygraph Tests,* in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, D. L. Faigman, D. Kaye, M. J. Saks, & J. Sanders (Eds. 1997); also partially available at *The Validity Of The Lie Detector: Two Surveys Of Scientific Opinion,* 87 J. APPLIED PSYCH. 426 (1997) [hereinafter, The Iacono & Lykken Survey; The Honts Survey, supra note 6.

18.1.1. The Gallup Organization in 1982 undertook the initial survey. That survey was replicated and extended in 1994 in Susan Amato's Master's Thesis at the University of North Dakota. The results of those surveys were very consistent. Roughly two thirds of the Ph.D. and M.D. members of the Society for Psychophysiological Research who were surveyed stated that they felt that polygraph tests were a valuable diagnostic tool when considered with other available information or that it was sufficiently reliable to be the sole determinant.[31] In The Amato Survey, when only those respondents who reported they were highly informed about the polygraph literature are considered, the percentage that opine that polygraph tests are a useful diagnostic tool rises to 83%. Of those individuals who rated themselves as highly informed, fewer than 10% report being involved in conducting polygraph examinations professionally. Therefore, these results are not suspect on the grounds that the responses were skewed by the financial self-interest of the respondents. These results would seem to indicate that there is a great deal of acceptance of these techniques in the relevant scientific community.

18.1.2. The Iacono and Lykken Survey also addressed the members of the SPR, but The Iacono and Lykken survey is seriously flawed and currently, is so surrounded by controversy and uncertainty that, in this Affiant's opinion, the results are not useful for any scientific or probative purpose[32].

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[31] Respondents in both surveys gave responses to the following question: Which one of these four statements best describes your own opinion of polygraph test interpretations by those who have received systematic training in the technique, when they are called upon to interpret whether a subject is or is not telling the truth? A) It is a sufficiently reliable method to be the sole determinant, B) It is a useful diagnostic tool when considered with other available information, C) It is questionable usefulness, entitled to little weight against other available information, D) It is of no usefulness.

[32] Drs. Iacono and Lykken are two of the most outspoken critics of polygraph testing. However, the present author believes that the Iacono and Lykken survey is so flawed and at this time so controversial, that it cannot be used for any substantive purpose. Problems with the Iacono and Lykken study include: 1) The cover letter for the Iacono and Lykken survey sets the survey in the context of the legal admissibility of the polygraph in court, rather than about the scientific validity of

18.1.3. Honts and his colleagues reported the most recent survey of scientific opinion regarding the validity of poly-

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the technique. In effect this is asking the respondents to make a political and legal judgement rather than a scientific one. This is in clear contrast to the Amato and Honts survey that was set in the context of whether or not the SPR should have a formal scientific policy regarding the validity of polygraph testing. The context of the Iacono and Lykken survey is clearly inappropriate since few, if any, of the members of the SPR have the legal background to make an admissibility statement. 2) Through discovery and cross examination in the cases of *The State of Washington v. Daniel Galleqos*, 95-1-02749-7 (1996) and *Steve Griffith v. Muscle Improvement, Inc.*, Superior Court of California, sworn deposition 21 April 1998, it was revealed that the sample of respondents to the Iacono and Lykken survey described themselves as very uninformed about the topic of polygraph examinations. Iacono and Lykken's respondents were asked, "About how many empirical studies, literature reviews, commentaries, or presentations at scientific meetings dealing with the validity of the CQT have you read or attended?" Unfortunately, subjects were asked to respond on a bizarre non-linear scale. Conversion of the scale units to item exposure rates reveals that the average respondent replied that she or he had been exposed to 3 items on the validity of the polygraph. Since the responses on this non-linear scale must have a strong positive skew, this means that many more than 50% of the subjects must have responded that they had been exposed to fewer than 3 items. Given the large number of scientific articles and presentations on this topic (the present author, has either authored or co-authored over 100 such papers and presentations by himself), these data provide a strong indication that the Iacono and Lykken sample was, as a whole, highly uninformed about the polygraph, and thus has little to offer in terms of informed opinion about its scientific validity. Unfortunately, Iacono and Lykken did not include any of this information in either of their publications and those results would remain unknown were it not for the discovery and cross-examination processes. 3) There is one known anomaly in the Iacono and Lykken data analysis that makes it impossible to compare some of their results to the other surveys in any meaningful way. In determining their highly informed group, Iacono and Lykken cut the distribution at 4 and above on their 7-point scale. In forming their highly informed group, Amato and Honts cut the distribution at 5 and above. This difference in cutting scores makes it impossible to compare these results across the two surveys. Iacono and Lykken's choice of a cutting point almost certainly reduced the confidence estimate by their highly informed subjects. 4) In their chapter in the Faigman et al. book, id., Iacono and Lykken describe their survey as a random survey. However, in the Journal of Applied Psychology version of their survey Iacono and Lykken reveal that their sampling was not random. Drs. Raskin, Honts, and Kircher were deliberately left out of the sampling frame and thus did not have an opportunity to review, respond, or be represented in the survey. 5) Because of the serious anomaly in the data analysis and the self-admitted misrepresentation of the survey in a publication intended for the legal profession, Dr. Amato and I became very concerned that there might be other undisclosed problems with the Iacono and Lykken survey. Under the ethical standards of the American Psychological

graph testing[33]. The Honts Survey also addressed members of the SPR. However, The Honts Survey also assessed the opinions of the member of the American Psychology – Law Society (APLS). The APLS is an organization of scientists and lawyers that study how scientific psychology and the law interact. The members of the APLS are familiar with conducting applied research for use in legal settings and with legal requirements for the admissibility of scientific evidence. Moreover, in recent years an increasing amount of research on polygraph testing has been presented at the APLS meetings and in Psychology and Law related journals. Thus, the members of the APLS are also likely to be familiar with much of the current scientific literature on polygraph testing. The Honts Survey found favorable attitudes toward the polygraph from the members of both the SPR and the APLS. Among the items surveyed, The Honts Survey addressed the following major questions:

18.1.3.1. How much weight should policy makers give to the results of laboratory studies of the polygraph? Of the APLS respondents, 81.2% endorsed giving labora-

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Association, scientists are required to make their data available for reanalysis by qualified scientists. On March 10, 1997, and now on many subsequent occasions Dr. Amato and I wrote to, first Dr. Iacono, and then to Dr. Lykken requesting the data from their survey for the purpose of reanalysis. To this date, they have refused to provide free access to their data. On 28 April 1998 Dr. Iacono requested copies of the data from the Amato and Honts survey. Those data were provided to Iacono within two weeks of the receipt of their request. Efforts to obtain the Iacono and Lykken data for reanalysis continued until 2003 when in *Kevin Lee, et al., Petitioners, v. Hon. Lourdes Martinez, Respondents*, County of Bernalillo, State of New Mexico, Second Judicial District Court, No. CS-2003-00026 (2003) Dr. Iacono testified that Dr. Lykken had reported to him that Dr. Lykken had destroyed all of the data from the Iacono and Lykken survey when Lykken retired. Since those data can now never be made freely available and a reanalysis can never be performed, it is my opinion that the Iacono and Lykken survey data cannot be relied upon for any substantive purpose. A critique of the Iacono and Lykken survey has been published, see David C. Raskin, Charles R. Honts, Susan Amato, & John C. Kircher *The case for the admissibility of the results of polygraph examinations: 1998 update.* Supplemental pocket part to: D. L. Faigman, D. Kaye, M. J. Saks, & J. Sanders (Eds.) MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY.

[33] The Honts Survey, supra note 6.

tory studies some weight or stronger, 49.1% endorsed given moderate or considerate weight. Of the SPR respondents, 76.3% endorsed giving some weight or stronger, 63.2% endorsed giving moderate or considerable weight.

18.1.3.2. Are polygraph studies published in scientific peer-reviewed journals based on generally accepted scientific methodology? The percentages responding, "Yes," APLS, 95.7%, SPR, 91.4%.

18.1.3.3. Scientists were asked to compare the forensic usefulness of the polygraph in comparison to other commonly offered types of evidence. Respondents from both organizations produced the same pattern of response. The results of this question are shown in Table 4.

Table 4.
Comparison of the Usefulness of the Polygraph to Other Forensic Sciences

Subjects were asked to compare the usefulness (less useful than, about the same as, or more than) of a properly conducted polygraph to other commonly admitted evidence. Percentages shown are those saying polygraph was as useful as, or more useful than the comparison technique.

Evidence	APLS	SPR
Psychologist's opinion of parental fitness	59.3%	55.6%
Psychologist's opinion regarding malingering	62.3%	55.6%
Eyewitness ID of robbery suspect	74.1%	73.0%
Psych assessment of dangerousness	71.7%	69.4%
Psych assessment of temporary insanity	74.5%	74.3%
Fingerprints	9.3%	16.7%
DNA	1.8%	5.6%

18.1.3.4. Finally, the respondents were asked this question: Would the accuracy of judicial verdicts be increased or decreased if experts could present polygraph test results in court? The percentage of respondents who opined that verdicts would either be unaffected, or would show increased accuracy, 72% for the APLS and 61% for the SPR.

18.2. A second and, in my opinion, more important indicator of the acceptance of the psychophysiological detection of deception in the scientific community is provided by the large number of original scientific studies published in peer-reviewed scientific journals. Studies reporting positive results for the validity of the polygraph have appeared in journals such as: *The Journal of Applied Psychology, The Journal of General Psychology, Psychophysiology, The Journal of Police Science and Administration, Current Directions in Psychological Science, Psychological Bulletin, The Journal of Research in Personality,* and *Law and Human Behavior,* to name but a few. To be published in any of these journals, the editor first sends an article out for review by two or three independent scientists who know the area but are not personally involved with the article under consideration. Those peer-reviewers comment on the quality of the literature review, the research design, the statistical analysis, the reasonableness of the conclusions drawn, and the appropriateness of the article for the respective journal. The Editor of the journal also reviews the article and, based on her or his evaluation and on the comments and recommendations of the reviewers, makes a decision about publication. Often revisions are required before publication. Articles with unacceptable scientific methods, statistics, or insupportable conclusions are not published. Articles that are not acceptable within the scientific discipline covered by the journal are not usually published. For example, the *Journal of Applied Psychology* rejects 85% of the manuscripts submitted to it for publication. Articles that report matters that are not acceptable psychological science do not usually make it through the peer review process and are not published in the *Journal of Applied Psychology.* The *Journal of Applied Psychology* has published numerous articles on the psychophysiological detection of deception.[34] The publication of numerous articles in main-

[34] Some of the articles on the polygraph published in the Journal of Applied Psychology are as follows: P. J. Bersh, *A Validation Study Of Polygraph Examiner Judgements,* JOURNAL OF APPLIED PSYCHOLOGY, 399, 53 (1969); P.O. Davidson, *Validity Of The Guilty Knowledge Technique: The Effects Of Motivation,* JOURNAL OF APPLIED PSYCHOLOGY, 52, 62-65 (1968); E. Elaad, (1990). *Detection Of Guilty Knowledge In Real-Life Criminal Investigations,* JOURNAL OF APPLIED PSYCHOLOGY, 75, 521-529 (1990);

stream journals of scientific psychology gives a clear indication that the community of scientific psychologists generally accepts the methods of the psychophysiological detection of deception. This opinion reflects the majority opinion of the members of the Society for Psychophysiological Research and the American Psychology – Law Society, see ¶¶ 12.1.3.2.

18.3. The increasing number of scientific publications on the topic and the involvement of a larger number of psychological laboratories also evidence the mainstream acceptance of the psychophysiological detection of deception. Moreover, the journal POLYGRAPH is now abstracted and indexed in the Criminal Justice Abstracts, reflecting its acceptance as an authoritative source of scientific information. In addition, a new peer-reviewed archival scientific journal devoted to the topic of credibility assessment began publication in early 1997[35].

18.4. The National Research Council of the National Academy of Science recently reviewed the scientific research concerning

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E. Elaad, A. Ginton & N. Jungman, *Detection Measures In Real-Life Criminal Guilty Knowledge Tests,* JOURNAL OF APPLIED PSYCHOLOGY, 77, 757-767 (1992); A. Ginton, D. Netzer, E. Elaad & G. Ben-Shakhar, *A Method For Evaluating The Use Of The Polygraph In A Real-Life Situation,* JOURNAL OF APPLIED PSYCHOLOGY, 67, 131-137 (1982); C. R. Honts, R. L. Hodes, & D. C. Raskin, *Effects Of Physical Countermeasures On The Physiological Detection of Deception,* JOURNAL OF APPLIED PSYCHOLOGY, 70, 177-187 (1985); C. R. Honts, D. C. Raskin, & J. C. Kircher, *Mental And Physical Countermeasures Reduce The Accuracy Of Polygraph Tests,* JOURNAL OF APPLIED PSYCHOLOGY, 79, 252-259 (1994); F. S. Horvath, *The Effect Of Selected Variables On Interpretation Of Polygraph Records,* JOURNAL OF APPLIED PSYCHOLOGY, 62, 127-136 (1977); J. C. Kircher & D. C. Raskin, *Human Versus Computerized Evaluations Of Polygraph Data In A Laboratory Setting,* JOURNAL OF APPLIED PSYCHOLOGY, 73, 291-302 (1988); C. J. Patrick, & W. G. Iacono, *Validity Of The Control Question Polygraph Test: The Problem Of Sampling Bias,* JOURNAL OF APPLIED PSYCHOLOGY, 76, 229-238 (1991); J. A. Podlesny & C. Truslow, *Validity Of An Expanded-Issue (Modified General Question) Polygraph Technique In A Simulated Distributed-Crimes-Roles Context,* JOURNAL OF APPLIED PSYCHOLOGY, 5 (1993).

[35] THE JOURNAL OF CREDIBILITY ASSESSMENT AND WITNESS PSYCHOLOGY published its first issue on 7 February 1997. One of the main topics identified in this journal's charter was the psychophysiological detection of deception.

the validity of the polygraph[36]. Although they were critical of the use of polygraph as a national security screening tool, they reached the following conclusions about specific issue polygraphs used in criminal cases:

> The available evidence indicates that in the context of specific-incident investigations and with inexperienced examinees untrained in countermeasures, polygraph test as currently used have value in distinguishing truthful from deceptive individuals.
>
> No alternative techniques are available that perform better, ... (p. 141)

19. There are standards for the administration of psychophysiological detection of deception tests. New Mexico Rule of Evidence 11-707[37] provides clear standards for tests to be offered as

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[36] National Research Council THE POLYGRAPH AND LIE DETECTION (2002). Available online from www.Nationalacademies.org

[37] New Mexico Rule of Evidence 11-707 (1983). New Mexico Rule 11-707 requires the following of all offers of polygraph evidence:

To be qualified as an expert for the purpose of giving testimony the examiner must have the following qualifications:

- At least five years experience in administration or interpretation of polygraph examinations or equivalent training.
- The expert must have conducted or reviewed the examination in accordance with the provisions of Rule 11-707.
- The expert must have successfully completed at least twenty hours of continuing education in the field of polygraph examinations during the twelve-month period immediately prior to the date of the examination.

To be admissible under Rule 11-707, the following must be shown to be true:

- The examination was conducted in accordance with Rule 11-707.
- The polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts.
- Prior to conducting the examination the polygraph examiner was informed as to the examinees' background, health, education and other relevant information.
- At least two relevant questions were asked during the examination.
- At least three charts were taken of the examinee.

Rule 707 also provides that any party who intends to use polygraph evidence at trial, shall not less than 30 days before trial or such other time as the district court may direct, serve upon the opposing party a written notice of such party's intention to use such evidence. The following reports shall be served with the notice:

- A copy of the polygraph examiner's report, if any.
- A copy of each chart.
- A copy of the audio or video recording of the pretest interview, actual testing

evidence in New Mexico courts of law and can serve as a model for other jurisdictions considering admission. In addition, The American Society of Testing and Materials (ASTM) International promulgates an international standard for administering psychophysiological detection of deception tests that are used in the context of criminal investigations[38].

OTHER CHALLENGES TO THE ADMISSIBILITY OF THE POLYGRAPH

20. **One often stated concern is that polygraph evidence will overwhelm juries and replace their role in assessing credibility.** There is an area of the science of Psychology and the Law that has addressed the impact of testimony concerning the outcome of polygraph examinations on juries.

20.1. I am familiar with the scientific literature concerning the impact of polygraph testimony on jury research. I have published a scholarly peer-reviewed work[39] that includes a review of this literature, and I have conducted original scientific research on the topic. The results of my research have been published in a peer-reviewed journal and have been presented at scientific meetings.

20.2. A number of studies have been conducted on the topic of the impact of polygraph testimony on juries.[40]

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and posttest interview.

A list of any prior polygraph examinations taken by the examinee in the matter under question, including the names of all persons administering such examinations, the dates and the results of the examinations.

Rule 11-707 requires that the pretest interview and actual testing shall be recorded in full on an audio or video recording device.

[38] American Society of Testing and Materials, Standard Guide for PDD Examination Standards of Practice, ANNUAL BOOK OF STANDARDS, Vol. 14.02 (2000).

[39] C. R. Honts, & M. V. Perry, *Polygraph Admissibility: Changes And Challenges*, 16 L. & HUM. BEHAV. 357 (1992).

[40] N. J. Brekke, P. J. Enko, G. Clavet, & E. Seelau, *The Impact Of Nonadversarial Versus Adversarial Expert Testimony*, 15 L. & HUM. BEHAV. 451 (1991). S. C. Carlson, M. S. Passano & J. A. Jannunzzo, *The Effect Of Lie Detector Evidence On Jury Deliberations: An Empirical Study*, 5, J. POLICE SCI. & ADMIN. 148 (1977). A. Cavoukian & R. J. Heslegrave, *The Admissibility Of Polygraph Evidence In Court: Some Empirical Findings*, 4, L. & HUM. BEHAV.

This research has been conducted both as experimental work with mock juries and by conducting post-trial interviews with jury members who had been presented with polygraph testimony. This literature is consistent in showing that juries are not inclined to give extraordinary weight to polygraph evidence. The research provides strong evidence that juries are capable of weighing and evaluating all evidence. Moreover, they are also capable of rendering verdicts that may be inconsistent with polygraph results. In no case did research suggest that polygraph testimony strongly or overwhelmingly affected the jury decision-making process. Typical of this research is the study done by Cavoukian and Heslegrave.[41] They report two experiments where cases were presented to mock juries either with or without polygraph evidence. Their mock jurors were asked to give ratings of their perceptions of the likelihood of the defendant's guilt and they were asked to render verdicts. In both experiments, in the absence of polygraph evidence, subjects tended to rate the defendant near the middle (uncertain) portion of the rating scale. This indicates that the evidence was relatively equivocal, the very type of case where polygraph evidence is likely to be offered. The addition of evidence that the defendant had passed a polygraph did shift ratings in the not guilty direction, but the effect was relatively small, shifting from a mean rating of about 3 to a mean rating of about 4 (7-point scale) in one experiment and from a mean rating of about 5 to a mean rating of about 6 (9-point scale) in the other experiment. Polygraph evidence had a significant effect on verdicts in one experiment, but polygraph testimony did not have a significant effect on verdicts in a second study. All effects of polygraph testimony were eliminated by the introduction of negative testimony by an opposing witness who testified that polygraph tests were only 80% accurate and that the results of polygraph tests should be viewed with skepticism. Cavoukiam and

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117 (1979). A. Markwart & B. E. Lynch, *The Effect Of Polygraph Evidence On Mock Jury Decision-Making*, 7, J. POLICE SCI. & ADMIN. 324 (1979); Bryan Meyers & Jack Arbuthnot, *Polygraph Testimony And Juror Judgments: A Comparison Of The Guilty Knowledge Test And The Control Question Test*, 27 J APPLIED SOCIAL PSYCH. 1421 (1997).

[41] Id.

Heslegrave concluded that concerns about blind acceptance and overwhelming impact of polygraph tests are unjustified. I concur.

20.3. Research conducted at the University of North Dakota by my graduate students and myself[42] has replicated the findings of the research described in ¶¶ 20.1 and 20.2 supra. In the context of a mock trial, we contrasted polygraph testimony with testimony concerning identification based on a blood test. Consistently, we found that jurors were more skeptical of polygraph testimony than they were of blood test testimony, even when the experts reported them to be of the same level of accuracy. There were no indications in any of the studies that polygraph evidence overwhelmed jurors or that they were unable to use and value evidence that ran contrary to the polygraph outcome.

20.4. My personal experience with giving testimony before juries has also indicated that juries are quite willing to discount polygraph testimony in favor of other testimony, and thus render verdicts contrary to the polygraph outcome.

20.5. I know of no data, published or unpublished, that supports the notion that juries give undue weight to polygraph evidence, or that they are unable to evaluate and weigh polygraph evidence in the context of other testimony given at trial.

21. The United States Government has been, and continues to be, a heavy user of polygraph tests.[43] Every federal agency with law

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[42] L. Vondergeest, C. R. Honts, & M. K. Devitt, *Effects Of Juror And Expert Witness Gender On Jurors' Perceptions Of An Expert Witness*. MODERN PSYCHOLOGICAL STUDIES, 1 (1993). M. K. Devitt, C. R. Honts, & R. Gillund. *Stealing Thunder Does Not Ameliorate The Effects Of The Hired Gun Cross-Examination Tactic*. Paper presented at the annual meeting of the American Association for Applied and Preventive Psychology, Chicago (1993). C. R. Honts, M. K. Devitt, & S. Amato, *Explanatory Style Predicts Perceptions Of Expert Witness Believability*. Paper presented at the annual Meeting of the American Association for Applied and Preventive Psychology, Chicago (1993). C. R. Honts, & M. K. Devitt, *The Hired Gun Cross Examination Tactic Reduced Mock Jurors' Perception Of Expert Witness' Credibility*. Paper presented at the biennial meeting of the American Psychology-Law Society/Division 41 San Diego, CA (1992).

[43] See, FISCAL YEAR 1996 REPORT TO CONGRESS ON THE DEPARTMENT OF DEFENSE POLYGRAPH PROGRAM, United States Department of Defense.

enforcement responsibilities has a staff of polygraph examiners. All of the national security agencies use the polygraph. Federal uses of the polygraph include criminal investigation, counterintelligence, foreign intelligence, national security screening, and exculpation. The U.S. Department of Defense maintains a training unit, the Department of Defense Polygraph Institute, which conducts and funds a substantial amount of scientific research on the polygraph. In Fiscal Year 1996, the Department of Defense alone ran 12,548 polygraph examinations (this does not include certain classified programs or the NSA whose polygraph activities are classified.) Of those 12,548 examinations, 63% were conducted as a condition of access to highly sensitive positions requiring classification clearance. Thus, the Department of Defense, a sophisticated user of technology, places extreme reliance on the ability of the polygraph to detect hostiles who attempt to penetrate our national security system. The Department of Defense Polygraph Institute has an official position in support of the admission of the results of competently conducted polygraph examinations at trial and has been teaching a course on how to offer polygraph results at trial. It has been estimated that the Federal government employs about 500 polygraph examiners and spends approximately 25 million dollars per year on examiner salaries alone.[44]

22. **The notion that polygraph examinations conducted in confidence for the defense are less valid than non-confidential tests ("The Friendly Polygraph Hypothesis")** has recently been re-examined by Charles R. Honts,[45] and his colleagues[46]. I know of no data, published or unpublished, that support the notion of the Friendly Polygraph Examiner Hypothesis. The argument regarding the Friendly Polygraph Examiner Hypothesis is as follows:

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[44] Gordon H. Barland, Ph. D., Chief, Special Projects, Department of Defense Polygraph Institute, Letter to Public Defender, Neni Odiaga, June 13, 1997.

[45] Charles R. Honts, IS IT TIME TO REJECT THE FRIENDLY POLYGRAPH EXAMINER HYPOTHESIS?, paper presented at the annual meeting of the American Psychological Society, Washington, D.C. (May, 1997). Available at: http://truth.idbsu.edu/polygraph/fpeh.html.

[46] David C. Raskin, Charles R. Honts, Susan Amato, & John C. Kircher, *The Case for The Admissibility of The Results of Polygraph Examinations: 1999 Pocket Part to Vol. 1* Of D. L. Faigman, D. Kaye, M. J. Saks, & J. Sanders (Eds.) MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, 160 (1999).

22.1. The notion that came to be know as the Friendly Polygraph Examiner Hypothesis was developed by Orne[47], who speculated that a guilty suspect who takes a non-law enforcement polygraph examination on a confidential basis can beat the test because of a lack of fear that an adverse result will be disclosed to the authorities. This speculation was based solely on the results of an unrealistic laboratory study in which college students were given only card tests and not a comparison question test.[48] Orne argued that if the suspect expects only favorable results to be reported, the suspect will be more confident, the examiner more supportive, the suspect will have little at stake, and the lack of fear of failure and disclosure will enable a guilty person to pass the test. However, Raskin pointed out that the scientific literature provides no support for the Friendly Polygraph Examiner Hypothesis and generally contradicts it.[49]

22.2. Laboratory studies where there is little at stake routinely produce detection rates of approximately 90%, ¶¶ 13 supra, and laboratory studies using placebos and other procedures designed to make guilty subjects believe they can pass the polygraph test showed no reduction in detection rates even for the guilty knowledge test, which is easier to beat[50]. If Orne's hypothesis were correct, one would expect laboratory studies of the CQT to produce relatively more false negative than false positive errors. This is clearly not supported by the data. Honts reviewed 20 laboratory studies of the CQT with a total of 567 guilty subjects and 490 innocent subjects.[51] The false negative rate was 12% and the false positive rate was 16%. This out-

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[47] Martin Orne, *Implications of Laboratory Research for the Detection of Deception*, in LEGAL ADMISSIBILITY OF THE POLYGRAPH 94 (N. Ansley ed. 1975).

[48] For a complete description and analysis, see David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 60 (1986)

[49] Id.

[50] Howard Timm, *Effect of Altered Outcome Expectancies Stemming from Placebo and Feedback Treatments on the Validity of the Guilty Knowledge Technique*, 67 J. OF APPLIED PSYCHOLOGY 391 (1982).

[51] Supra note 43.

come is opposite to the prediction generated by the friendly examiner hypothesis. Notably, 6 of the 20 laboratory studies reported no errors with guilty subjects, despite a lack of fear of any negative sanctions associated with failing the test.

22.3. Criminal suspects have no assurance that adverse results will remain confidential since most examiners advise them of their rights and obtain a written waiver prior to the test[52]. They also have a great deal at stake because a favorable test may help to obtain a dismissal or acquittal on the charges and an unfavorable outcome may result in increased legal costs, personal stress, and disruption of their relationship with their defense counsel. These are far greater motivations than the small amount of money guilty subjects have at stake when they routinely fail laboratory polygraph tests.

22.4. In order to pass a CQT, the guilty suspect must show stronger physiological reactions to comparison (control) questions than to the relevant questions about the charges. There is no psychological mechanism or logical argument that explains who a low level of fear or concern about the test outcome can selectively reduce the reactions to the relevant questions and simultaneously enhance the physiological responses to comparison questions to produce a pattern that appears to indicate truthfulness. In fact, fear is not a necessary part of any modern scientific polygraph theory of the comparison question tests.[53] The laboratory data and a logical analysis thus soundly contradict the "friendly examiner" hypothesis.

22.5. There are two published sets of data from tests of criminal suspects that also contradict the friendly examiner hypothesis. Raskin presented complete data from 12 years of his confidential CQT examinations for defense attorneys and non-confidential

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[52] David C. Raskin, *Polygraph Techniques for the Detection of Deception*, in PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE 255 (D. Raskin ed. 1989).

[53] See discussions in, John A. Podlesny & David C. Raskin, *Physiological Measures and the Detection of Deception*, 84 PSYCHOLOGICAL BULLETIN 783 (1977) and S. Peter Rosenfeld, *Alternative Views of Bashore and Rapp's (1993) Alternatives to Traditional Polygraphy: A Critique*, 117 PSYCHOL. BULLETIN 159 (1995).

tests for law enforcement, courts, and stipulated situations.[54] He reported that 58% of suspects who were informed that the results would be provided to the prosecution passed their tests, but only 34% of those who took confidential defense tests were able to pass. In addition, the numerical scores were significantly more negative (in the deceptive direction) for confidential tests compared to the more positive scores (in the truthful direction) for non-confidential tests. Honts recently presented a similar, complete set of data from 14 years of confidential and non-confidential examinations.[55] He reported that 44% of the confidential tests were passed, while 70% of the non-confidential tests were passed. These recent data are also opposite to the effects predicted by the friendly examiner hypothesis. The foregoing analysis and these data clearly demonstrate that the friendly examiner hypothesis fails on all counts. It is illogical, unsupported by laboratory studies, and is contradicted by data from actual field cases.

23. **Although the role of credibility assessment has traditionally been left to juries, scientific research suggests that the average person is not very good at detecting deception.** This research has been reviewed on a number of occasions and the reviews converge on a conclusion that without an intimate knowledge of the individual, or instrumental assistance, the average adult, including lawyers, judges, police officers, intelligence officers and psychologists are, at best, only slightly better than chance at detecting deception by adults or children.[56] Thus given the validity data for the polygraph described above, it would appear that a properly conducted polygraph test would offer valid and helpful information to

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[54] Supra note 46 at 62.

[55] Supra note 43..

[56] See reviews by: Aldert Vrij, DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND IMPLICATIONS FOR PROFESSIONAL PRACTICE (2000); Paul Ekman TELLING LIES (1986); Paul Ekman and Maureen O'Sullivan 46, Who can catch a liar? 913 AMERICAN PSYCHOLOGIST (1991); Bella M. DePaulo 3 *Spotting Lies: Can Humans Learn To Do Better?* CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 83 (1994); and Douglas P. Peters, *The Willingness Of Children To Lie And The Assessment Of Credibility In An Ecologically Relevant Laboratory Setting*, 3, APPLIED DEVELOPMENTAL SCIENCE, 92 (1999); Paul Ekman, Maureen O'Sullivan, and Mark G. Frank, *A Few Can Catch A Liar*, 10 PSYCHOLOGICAL SCIENCE, 263, (1999).

the trier of fact in his or her task of assessing credibility in context of a criminal or civil trial.

24. It is my opinion that the above statements represent the current state of the science on polygraph testing.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Donald Paul BOLTON,
Petitioner,

v.

Mary BERGHUIS,
Respondent.
_____/

Case No. 1:02-CV-220

BEFORE: Hon. Richard Alan Enslen

FINAL ORDER

This matter is before the Court on Petitioner Donald Paul Bolton's Objections to United States Magistrate Judge Ellen S. Carmody's Report and Recommendation of February 2, 2005. The Court now reviews those Objections *de novo*. *See* 28 U.S.C. § 636.

Upon such review, the Court determines that the Report should be adopted and the Objections denied for the reasons set forth in the Report and the additional reasons given herein. This case involves the interesting intersection of three legal subjects: (1) emerging case law concerning the one-year limitation period of 28 U.S.C. § 2244(d) (which is pertinent to petitions under 28 U.S.C. § 2254);

(2) emerging case law concerning the "actual innocence" exception to the limitation period; and (3) the use of polygraph examinations as proof of "actual innocence."

This Court shares the Magistrate Judge's conclusion that Petitioner, through the exercise of ordinary diligence, should have discovered his habeas claims relating to a "conflict of interest" in July 1995. Thus, this Petition was filed outside of the one-year limitation period. The Court also determines that Petitioner is not entitled to equitable tolling of the limitation period. The Sixth Circuit Court of Appeals' decisions in *Palmer v. Carlton*, 276 F.3d 777, 779 (6th Cir. 2002) and other cases permit equitable tolling in limited circumstances. The case law as to equitable tolling, however, has not expanded enough to make Petitioner a good candidate. *See Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001) (discussing pertinent factors). The recent case of *Griffin v. Rogers*, – F.3d –, 2005 WL 486665 (6th Cir. Mar. 3, 2005) is also inapposite. Though its holding permits broader equitable relief, Petitioner in this case was not diligent enough to qualify for tolling, nor do the circumstances of his case compare well to those in *Griffin*.

As to actual innocence, the Sixth Circuit's recent decision in *Souter v. Jones*, – F.3d –, 2005 WL 86477 (6th Cir. Jan. 18, 2005) now permits the assertion of "actual innocence" as an exception to section 2244 in non-capital cases. Notwithstanding, Petitioner has not made a sufficient showing of actual innocence. Despite the noble arguments of his expert, the field of polygraph examination remains a highly disputed procedure. *United States v. Scheffer*, 523 U.S. 303, 309-10 (1998). The field has not so far progressed that the federal courts can require the Michigan courts to recognize polygraph evidence upon re-trial contrary to state law. *Id.* In the absence of that, a re-trial would make little sense since a jury has already had a fair opportunity to weigh the previous evidence. It is true, as argued by counsel, that "actual innocence" is only a gateway requirement; but it is a gateway which is broached only if the "new evidence" offers some prospect for relief. When a new jury must ignore the new evidence under state law, it is a gateway to nowhere.

For the reasons given, the habeas petition will be denied with

prejudice. Notwithstanding, the Court must individually examine the habeas claims to determine whether a certificate of appealability should issue. *See* 28 U.S.C. § 2253(c); *Porterfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001). Section 2253(c) permits a certificate only when a petitioner has made a "substantial showing of the denial of a constitutional right." These words have been interpreted by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) as applying the standard given in *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Namely, a petitioner must show "that reasonable jurists could debate whether (or . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893, n.4).

Further, the *Slack* decision held that the *Barefoot* analysis is different depending on whether the decision appealed rests on procedural or substantive grounds.

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 484.

In this case, the underlying habeas issues were resolved by the procedural ruling. The procedural ruling, though resting on a solid legal basis, is objectively debatable because of the evolving law on the issues of equitable tolling and "actual innocence." This is particularly so because, in light of attorney Frank Stanley's fine representation, the appeal deserves encouragement.

THEREFORE, IT IS HEREBY ORDERED that the Petitioner Donald Paul Bolton's Objections (Dkt. No. 94) are **DENIED,** the Report and Recommendation (Dkt. No. 93) is **ADOPTED,** Respondent's Second Motion to Dismiss (Dkt. No. 88) is **GRANTED,** the Petition for Writ of Habeas Corpus is **DENIED WITH PREJUDICE,** and a certificate of appealability is **GRANTED** as to all grounds asserted.

DATED in Kalamazoo, MI:
March 9, 2005

/s/ Richard Alan Enslen

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Donald Paul BOLTON,
Petitioner,

v.

Mary BERGHUIS,
Respondent.
_____/

Case No. 1:02-CV-220

BEFORE: Hon. Richard Alan Enslen

REPORT AND RECOMMENDATION

This matter is before the Court on Respondent's Second Motion to Dismiss for Failure to Comply with the Statute of Limitations. (Dkt. #88). Respondent asserts that Bolton's petition for writ of habeas corpus is untimely and, therefore, barred by 28 U.S.C. § 2244(d). In accordance with 28 U.S.C. § 636(b) authorizing United States Magistrate Judges to submit proposed findings of fact and recommendations for disposition of prisoner petitions, the undersigned recommends that Respondent's motion be **granted** and Bolton's petition be dismissed.

BACKGROUND

On September 3, 1992, Petitioner participated in the attempted murder of a Berrien County Sheriff's Deputy. (Trial Transcript, April 7, 1993, 69-194). Following a jury trial, Petitioner was convicted of (1) assault with the intent to murder, (2) felonious assault, (3) armed robbery, (4) carrying a concealed weapon, and (5) possession of a firearm during the commission of a felony. On June 1, 1993, Petitioner was sentenced to a term of life imprisonment on the assault with intent to murder conviction, and lesser sentences on the four remaining convictions. (Sentencing Transcript, June 1, 1993). Petitioner appealed his conviction to the Michigan Court of Appeals, asserting the following claims:

I. The trial court erred when it denied Defendant's motion for a directed verdict as to Count V – armed robbery.

II. The trial court erred when it denied Defendant's motion in limine regarding Officer Unruh's in-court identification of Defendant based upon an improper photo display.

III. The trial court erred in overruling Defendant's objections to the sentencing information report.

IV. The trial court improperly departed from the sentencing guidelines.

Plaintiff's appeal was denied on July 25, 1995. *People v. Bolton*, No. 165706, Opinion (Mich. Ct. App., July 25, 1995). Petitioner subsequently filed in the Michigan Supreme Court a delayed application for leave to appeal in which he asserted the following claims:

I. The trial court erred when it denied Mr. Bolton's motion for a directed verdict on the armed robbery count because the People did not prove beyond a reasonable doubt that Mr. Bolton intended to permanently deprive the officer of any property.

II. The trial court erred when it permitted Officer Unruh to make an in-court identification of Mr. Bolton

based upon an unduly suggestive photo identification made without presence of counsel.

III. The trial court erred when it departed from the guidelines and imposed a life sentence upon the Defendant. If the armed robbery conviction is upheld, the trial judge also erred by departing and imposing a 15-30 year sentence for that offense.

Plaintiff's motion for leave to appeal was denied. *People v. Bolton*, No. 104283, Order (Mich., May 31, 1996). In January 1999, more than two and one-half years later, Petitioner filed in the trial court a motion for relief from judgment asserting that his trial counsel rendered ineffective assistance and, furthermore, represented him while laboring under a conflict of interest. *People v. Bolton*, No. 92-3426-FC, Opinion (Berrien Cty. Cir. Ct., Mar. 21, 2001). The trial court denied Petitioner's motion. *Id.* Asserting the following claims, Petitioner then moved in the Michigan Court of Appeals for leave to appeal the trial court's decision:

I. The trial court erred when it concluded that the Appellant was required to show an actual conflict of interest rather than a potential conflict of interest.

II. Even if an actual conflict of interest was the proper standard, the trial judge erred by concluding that an actual conflict was not shown.

III. Even if there was not conflict of interest, relief should have been granted on the grounds of constitutionally ineffective lawyering.

The court denied Petitioner's request. *People v. Bolton*, No. 234102, Order (Mich. Ct. App., Aug. 16, 2001). Asserting the same issues, Petitioner later moved in the Michigan Supreme Court for leave to appeal this determination. The court denied Petitioner's request. *People v. Bolton*, No. 119994, Order (Mich., Mar. 4, 2002). On April 3, 2002, Bolton filed the present petition for writ of habeas corpus. (Dkt. #1). Bolton's petition raises the following claims:

I. The trial court's decision was contrary to clearly established federal law and/or an unreasonable appli-

cation of federal law when the court concluded that the Petitioner was required to show an actual rather than a potential conflict of interest. The failure of the appellate courts to review also violated federal habeas standards.

II. Even if actual conflict is the proper standard, the trial judge misapplied clearly established federal law and/or made an unreasonable interpretation of that law by concluding that an actual conflict was not shown. The appellate courts also violated federal habeas standards when they refused discretionary review.

III. Even if there was no conflict of interest, it was a contrary application of clearly established federal law or an unreasonable application of that law to have denied relief because the record showed that the Petitioner had received constitutionally ineffective lawyering.

On September 11, 2002, Respondent moved the Court to dismiss Bolton's petition as untimely. (Dkt. #10). Petitioner countered with two arguments. He first asserted that because the statute of limitations was subject to equitable tolling his habeas petition was not untimely. Petitioner further argued that because he did not discover the factual basis for the claims asserted in his petition for writ of habeas corpus until January 1999, his claim for habeas relief was timely filed.

On February 13, 2003, the undersigned issued a Report and Recommendation concluding that equitable tolling of the statute of limitations was inapplicable in this matter. (Dkt. #19). With respect to Petitioner's claim that he could not have discovered the factual basis for his habeas claims until January 1999, it was further recommended that Respondent's motion to dismiss be denied without prejudice pending a hearing at which the issue could be more fully explored. On April 7, 2003, the Honorable Richard Alan Enslen issued an Order adopting the Report and Recommendation. (Dkt. #27).

Subsequent pleadings raised the issue as to which party must bear the burden of proof on the issue of whether Bolton's petition was timely filed. On August 26, 2003, the Honorable Richard Alan Enslen issued an Opinion and Order clarifying the matter. (Dkt. #49-50). Relying on Sixth Circuit authority, the Court concluded that Petitioner bears the burden of proof "as to the starting date [of the statute of limitations] under section 2244(d)(1)(D)." *See Stokes v. Leonard,* 2002 WL 531139 at *3 (6th Cir., April 4, 2002) (citing *Lott v. Coyle,* 261 F.3d 594, 605-06 (6th Cir. 2001)).

On October 16, 2003, the undersigned conducted a hearing at which to explore the issues raised by Respondent's motion to dismiss. At the outset of the hearing, Petitioner presented the Court with his Memorandum on Burden of Proof. (Dkt. #52). While acknowledging that habeas petitioners generally bear the burden of proof on statute of limitations issues, Petitioner asserted that there exists "an important exception" to this general rule. Claiming that this "exception" was presently applicable, Petitioner asserted that Respondent must bear the burden of proof to establish the untimeliness of his petition for writ of habeas corpus. Petitioner's pleading was interpreted as a motion to revisit the Court's previous determination of this particular issue. Petitioner further asserted that Respondent had waived any statute of limitations defense by her alleged failure to comply with Rule 5 of the Rules Governing Section 2254 Cases. The Court interpreted this claim as a motion to preclude Respondent from asserting any defense based upon the alleged untimeliness of Bolton's petition for write of habeas corpus.

On October 17, 2003, the undersigned issued a Report recommending that Petitioner's motion to shift the burden of proof be denied and further recommending that Respondent had not waived the right to assert a statute of limitations defense. (Dkt. #53). On November 20, 2003, the Honorable Richard Alan Enslen issued an Order adopting this Report and Recommendation. (Dkt. #57). Respondent subsequently filed the present motion reasserting her position that Bolton's petition for writ of habeas corpus is untimely and must, therefore, be dismissed. Petitioner counters that his petition is timely because he did not uncover the factual basis of his claims until January 1999. Bolton also reiterates his claim that his

petition is timely because the statute of limitations is subject to equitable tolling in this matter.

I. Bolton's Petition Is Not Timely

Bolton's petition, filed on April 3, 2002, is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), enacted April 24, 1996. *See Herbert v. Billy*, 160 F.3d 1131, 1134-35 (6th Cir. 1998). Among other things, the AEDPA amended 28 U.S.C. § 2244 to include a one-year limitations period within which an inmate challenging a state court judgment must file his habeas petition. The applicable statute provides that:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review on the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244.[1]

As noted above, on May 31, 1996, the Michigan Supreme Court denied Petitioner's delayed motion for leave to appeal the denial of his direct appeal. Petitioner did not petition for certiorari to the United States Supreme Court, thus his conviction became final ninety (90) days later on August 30, 1996. Petitioner concedes that if the limitations period began to run from that date, *see* 28 U.S.C. § 2244(d)(1)(A), his petition would be untimely.

Petitioner argues, however, that his petition is not untimely because the limitations period did not begin to run in this matter until March 4, 2002. Specifically, Petitioner asserts that he did not uncover the factual predicate for the claims asserted in his petition until January 1999. While such knowledge would ordinarily cause the limitations period to begin running, *see* 28 U.S.C. § 2244(d)(1)(D), Petitioner further asserts that the limitations period was immediately tolled by the contemporaneous filing of his state court post-conviction motion for relief (in which he raised the claims asserted in the present petition for writ of habeas corpus). *See* 28 U.S.C. § 2244(d)(2). Because the filing of such a motion tolls the statute of limitations, Petitioner asserts that the statute of limitations did not actually begin to run until March 4, 2002, the date on which his motion for post-conviction relief was denied by the Michigan Supreme Court. Noting that he filed his petition for writ of habeas corpus 30 days later, Bolton asserts that his petition is timely.

Petitioner's argument assumes, of course, that January 1999 constitutes the "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *See* 28 U.S.C. § 2244(d)(1)(D). As the Court has previously determined, however, the burden rests with Petitioner to establish that such is the case. It must be noted, however, that simply concluding that Petitioner could have uncovered, through the

[1] There is neither evidence nor allegation that Petitioner suffered any state-created impediment which prevented him from filing a petition for writ of habeas corpus, nor does Petitioner's claim for relief rely upon newly recognized constitutional rights made retroactively applicable by the United States Supreme Court. Accordingly, sections 2244(d)(1)(B) and 2244(d)(1)(C) have no application in this matter.

exercise of due diligence, the factual predicate of claims herein asserted prior to January 1999 does not automatically lead to the conclusion that the present petition for habeas relief is untimely.

The statute of limitations is one year in duration. Under Petitioner's theory, because he filed the present petition only 30 days after the final resolution of his state post-conviction motion, there still remained 335 days in the limitations period when the present action was initiated. Thus, while Petitioner asserts that he could not have learned of the factual basis for his present claims before January 1999, to establish that his habeas petition is timely he need only demonstrate that he could not have uncovered the facts relevant to his claims at any date before January 30, 1998.[2]

In other words, even if the limitations period began to run on January 30, 1998 (as opposed to January 1999 as Petitioner asserts), his petition would still be timely, as he would obtain the benefit of the 335 days remaining in the limitations period. It must be reiterated, however, that Petitioner bears the burden of proof "as to the starting date [of the statute of limitations] under section 2244(d)(1)(D)." Thus, Petitioner bears the burden of establishing that he could not, through the exercise of due diligence, have learned of the factual predicate of the claims asserted in his petition for writ of habeas corpus before January 30, 1998. However, if the evidence reveals that Petitioner could have uncovered the factual predicate of his claims prior to January 30, 1998, his petition for writ of habeas corpus must be dismissed as untimely.

In his petition for writ of habeas corpus Bolton asserts that his trial attorney, Frederick Taylor, rendered ineffective assistance and labored under an impermissible conflict of interest. Specifically, Petitioner asserts that at the time Mr. Taylor was defending him against charges that he assaulted a police officer, Mr. Taylor was an

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[2] Petitioner has not identified precisely which day in January 1999 he filed his post-conviction motion for relief. Respondent has not identified this date, nor is such identified in the Rule 5 material. For purpose of its analysis, therefore, the Court has interpreted these dates in the manner most beneficial to Petitioner. Specifically, the Court has assumed that Petitioner filed his post-conviction motion for relief on the first day of January 1999, thus giving Petitioner the greatest possible benefit of the 335 days allegedly remaining in the limitations period when he filed his petition for writ of habeas corpus.

active member of the Kalamazoo County Sheriff's Department Mounted Division. (Dkt. #1 at 13). The evidence reveals that Petitioner, his family, and his attorneys all learned of the existence of this alleged conflict of interest in the late-spring or early summer of 1995.

On December 16, 1999, the trial court conducted an evidentiary hearing on Petitioner's post-conviction motion for relief. Petitioner's mother, Violet Bolton, testified at this hearing. She stated that after Petitioner's trial an acquaintance informed her that Mr. Taylor "was a member of the Kalamazoo County Sheriff's Posse." (Hearing Transcript, December 16, 1999, 185). Ms. Bolton testified that she learned of this information "while Michael Stein was still [Petitioner's] attorney." *Id.* at 212.

Michael Stein represented Petitioner on his direct appeal to the Michigan Court of Appeals. (Dkt. #1 at 6-7; Hearing Transcript, December 16, 1999, 212). However, shortly before the Michigan Court of Appeals issued its July 25, 1995 decision, Mr. Stein had to withdraw his representation because he had accepted a position as a prosecutor. (Hearing Transcript, December 16, 1999, 196, 212-14, 251). It was at this point that Mr. Stanley, Petitioner's present counsel, began his representation of Petitioner. *Id.* at 196, 214.

Petitioner's mother testified that after learning that Mr. Taylor may have been a member of a sheriff's posse she asked Mr. Stein to verify the accuracy of what she had been told. *Id.* at 213. Before terminating his representation of Petitioner, Mr. Stein wrote to the Kalamazoo County Sheriff's Department seeking conformation regarding Mr. Taylor's affiliation with the Kalamazoo Sheriff's Department. *Id.* at 213. On July 19, 1995, Mr. Stein received the following letter from Captain Timothy Lisk, a Division Commander with the Kalamazoo County Sheriff's Department:

> The information you have received on Mr. Taylor being a member of the Sheriff's Mounted Division is correct. The Kalamazoo County Sheriff's Department Mounted Division is comprised of a group of volunteers who own their own horses and trailering equipment and give of their personal time, assisting this department in activities rang-

> ing from search and rescue to security at functions such as the County Fair.
>
> These individuals are sworn in as Special Deputy Sheriff's and their level of authority is only as directed by a regular Deputy Sheriff.
>
> If you have any further questions concerning Mr. Taylor and/or the Kalamazoo County Mounted Division, please feel free to contact me.

(Dkt. #1, Unnumbered Exhibit).

Ms. Bolton testified that when Mr. Stanley began his representation of Petitioner he was aware of Mr. Taylor's association with the Kalamazoo County Sheriff's Department. (Hearing Transcript, December 16, 1999, 214-15). This is consistent with the statement made by Mr. Stanley at the outset of the hearing that he learned of Mr. Taylor's alleged conflict of interest "approximately two years after the date of sentencing."[3] *Id.* at 10. It is likewise consistent with subsequent assertions made by Mr. Stanley in the course of the present action. (Dkt. #15 at 11-12).

In support of his request for habeas relief, Petitioner has also submitted affidavits allegedly authored (but never executed) by his mother, his father, and himself. (Dkt. #1, Unnumbered Exhibits). The contents of these affidavits are consistent with the above evidence that Petitioner, his family, Mr. Stein, and Mr. Stanley all learned of Mr. Taylor's alleged conflict of interest in the late spring or early summer of 1995. While these affidavits are of no positive evidentiary value, because they were never executed, the Court finds them nonetheless relevant to the extent that they do not contradict the other evidence detailed above.

In sum, the evidence reveals that as of July 1995, Mr. Stanley was aware of at least the basic facts underlying Petitioner's claim (asserted in his petition for writ of habeas corpus) that his Sixth Amendment rights were violated as a result of the alleged conflict of interest under which Mr. Taylor operated. Specifically, Mr. Stanley knew that Mr. Taylor was a member of the Kalamazoo

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[3] As noted above, Petitioner was sentenced on June 1, 1993.

County Sheriff's Department Mounted Division. He was also aware (as the letter above reveals) of the basic duties or responsibilities of a member of the Mounted Division. More importantly, Mr. Stanley was aware that if he had "any further questions concerning Mr. Taylor and/or the Kalamazoo County Mounted Division," he was "free" to contact the Kalamazoo Sheriff's Department.

Despite possessing this knowledge in July 1995, Mr. Stanley nonetheless asserts that it took him, through the exercise of due diligence, until January 1999 *(forty-one months later)* to properly investigate the factual basis for Petitioner's Sixth Amendment denial of counsel claim. Counsel has submitted no evidence to support his claim.

Mr. Stanley asserts that "it took a considerable period of time to investigate these claims and to determine whether there was any factual basis to them." (Memorandum in Support of Habeas Corpus Petition at 3). Counsel further asserts that "the trial attorney's membership in a police-related organization was not per-se proof of a conflict. Additional facts were necessary before the significance of that membership could be sufficiently established." (Dkt. #91 at 25).

Counsel has failed, however, to identify what additional facts were necessary to properly evaluate Petitioner's claim. Moreover, counsel has failed to identify *any* investigatory efforts that he undertook subsequent to July 1995. The Court is not suggesting that counsel did not undertake any such investigatory efforts, but it is relevant that counsel has failed to identify the nature of any such efforts or articulate their relevance to Petitioner's habeas claims.

Furthermore, a review of Bolton's petition for writ of habeas corpus fails to support counsel's position. In support of his claim that Mr. Taylor represented him while operating under an impermissible conflict of interest, Petitioner relies upon evidence obtained from himself, his mother, Mr. Taylor, Captain Lisk, Raymond Bahr (a member of the Berrien County Sheriff's Department Mounted Division), and Dennis Wiley (the prosecutor at Petitioner's criminal trial). The Court concludes that these facts were either (a) known to counsel in July 1995, or (b) through the exercise of due diligence could have been ascertained soon thereafter. Counsel has advanced neither argument nor evidence suggesting otherwise.

As indicated above, Petitioner's conviction did not become final until August 30, 1996, more than one year after counsel learned of Mr. Taylor's alleged conflict of interest. For the reasons articulated above, the Court concludes that *a diligent* investigation of the facts underlying the claims asserted in Bolton's petition for writ of habeas corpus would have been completed no later than August 30, 1996, the date on which Petitioner's conviction became final. Furthermore, in the absence of any evidence suggesting otherwise, the Court can envision no circumstance in which a *diligent* investigation of the facts underlying Petitioner's claims would have taken until January 1999 (as Petitioner asserts) or even January 30, 1998 (the latest date by which the limitations period could have started and still rendered timely Bolton's petition). Thus, by the time that Petitioner filed his post-conviction motion for relief in January 1999, the statute of limitations had long since expired.

II. Equitable Tolling is not Applicable in this Matter

In response to Respondent's second motion to dismiss Petitioner reasserts the same arguments regarding equitable tolling that he previously asserted. The Court has already concluded that equitable tolling has no application in this matter and Petitioner offers nothing new in the way of authority or analysis to warrant a different conclusion.

When considering a claim that a statute of limitations should be equitably tolled, the Court must consider five factors: (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. *Dunlap v. United States,* 250 F.3d 1001, 1008 (6th Cir. 2001).

Petitioner does not assert that he was unaware of the relevant limitations period, but instead relies upon a line of cases examining the relationship between the AEDPA's exhaustion requirement and its statute of limitations. Specifically, Petitioner relies on a series of Sixth Circuit cases, *Palmer v. Carlton,* 276 F.3d 777 (6th Cir. 2002); *Hill v. Anderson,* 300 F.3d 679 (6th Cir. 2002); and

Hargrove v. Brigano, 300 F.3d 717 (6th Cir. 2002); as well as one district court case, *Sitto v. Bock,* 207 F.Supp.2d 668 (E.D.Mich. 2002). As detailed previously, these cases are distinguishable and fail to support Petitioner's position.

In *Palmer v. Carlton,* 276 F.3d 777 (6th Cir. 2002), the petitioner was convicted in 1987 and pursued post-conviction relief in the state courts through December 8, 1997, at which point the limitations began to run. *Id.* at 779. Palmer filed his petition for writ of habeas corpus exactly one year later, on December 8, 1998. Because Palmer's petition contained claims which he had failed to exhaust in the state courts, the federal district court, on March 2, 1999, granted Palmer's motion to voluntarily dismiss his habeas petition to permit him the opportunity to properly exhaust his state remedies.

Palmer returned to state court, filing a second post-conviction motion for relief. *Id.* The state court denied Palmer's motion on March 22, 1999, concluding that he had waived the issues raised therein. *Id.* at 779, 781. On May 24, 1999, Palmer again filed in federal court a petition for writ of habeas corpus. *Id.* at 779. The federal district court dismissed this petition as untimely, concluding that because Palmer's second state court post-conviction motion had not been "properly filed," its filing did not toll the relevant limitations period. Thus, by the time Palmer filed his second petition for habeas relief, the limitations period had apparently expired. *Id.*

The Sixth Circuit first observed that the district court's analysis regarding whether Palmer's second post-conviction motion was "properly filed" had since been rejected by the United States Supreme Court in *Artuz v. Bennett,* 531 U.S. 4 (2000). *Palmer,* 276 F.3d at 779. The Sixth Circuit further observed, however, that even if Palmer's second post-conviction motion did serve to toll the limitations period, his second petition for writ of habeas corpus was still untimely because the limitations period had expired on the very day he filed his initial habeas petition. *Id.* at 779-80. Thus, for reasons other than those relied upon by the district court, the Sixth Circuit upheld the dismissal of Palmer's petition as untimely.

The Court continued, however, "tak[ing] note of the analysis" articulated by Justice Stevens in *Duncan v. Walker,* 533 U.S. 167

(2001),[4] in which he remarked that "Congress . . . overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." *Palmer,* 376 F.3d at 780. As the Sixth Circuit recognized, Justice Stevens suggested "two alternative courses of action" which a federal district court might employ when faced with such a situation. *Id.*

First, the district court could "implement a stay over habeas proceedings until unexhausted claims are addressed in state courts." *Id.* at 780-81. Relying upon his belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA, Justice Stevens also proposed that district courts equitably toll the limitations period during the time that an initial habeas petition is pending prior to any dismissal to permit exhaustion of state remedies. *Id.* at 781.

The Sixth Circuit noted that the Second Circuit had recently decided a case, *Zarvela v. Artuz,* 254 F.3d 374 (2d Cir. 2001), in which it employed this alternative approach recommended by Justice Stevens. In this respect, the Sixth Circuit stated that

> The Second Circuit approach is eminently reasonable. It addresses the equitable concerns raised by Justice Stevens in *Duncan,* preserves the interests in comity embraced by *Lundy,* and prevents the potential abuse of the writ perpetrated by some petitioners. As countenanced by Justice Stevens, Congress could not have desired the outcome facing Palmer: the preclusion of a timely-filed petition for the writ due to the need to accord state courts the opportunity to adjudicate claims.

Id.

While noting with approval the approach employed by the Second Circuit in *Artuz,* the Sixth Circuit concluded that under that

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[4] In *Duncan,* the Court held that a *federal* habeas petition is not properly considered an application for "State post-conviction or other collateral review" within the meaning of § 2244(d)(2) and thus does not toll the period of limitations.

approach Palmer's petition was still untimely. Specifically, the court noted that while Palmer exhausted his state court remedies on March 22, 1999, he waited until May 24, 1999, to file his second habeas petition. *Id.* at 781-82. Because this period extended well beyond the 30-day period adopted in *Artuz,* the court concluded that *Artuz* was of no benefit to Palmer. *Id.*

In *Hill v. Anderson,* 300 F.3d 679 (6th Cir. 2002), the court was again faced with the "mixed petition problem." In *Hill,* the petitioner filed in federal court a petition for writ of habeas corpus containing some issues that had been exhausted in the state courts and other issues that had not been exhausted. *Id.* at 682. While courts are permitted to deny mixed petitions on the merits, *see* 28 U.S.C. § 2244(b)(2), the Sixth Circuit declined to do so in this case because one of Hill's exhausted claims presented "a serious question." The court also noted that while habeas petitions containing unexhausted claims can be granted in certain circumstances, such circumstances were not applicable.

The court then observed that the Second Circuit, in *Artuz,* had also faced "a similar mixed petition problem." Adopting the approach articulated in *Artuz,* the *Hill* court remanded the matter to the district court with instructions to dismiss Hill's unexhausted claim, permitting him to properly exhaust such, but to also stay Hill's remaining habeas claims pending exhaustion of his state court remedies. *Id.* at 682-83.

The petitioner in *Hargrove v. Brigano,* 300 F.3d 717 (6th Cir. 2002), timely filed a petition for writ of habeas corpus in which he asserted a single, yet unexhausted, claim. *Id.* at 718. The district court dismissed Hargrove's petition without prejudice so that he could properly exhaust his claim. The court also ruled that it would toll the limitations period, as of the date his habeas petition was filed, "on the condition that Hargrove pursue his state remedies within thirty days of the court's order and return to federal court within thirty days of exhausting his state remedies." The court's ruling was "an attempt to save Hargrove's next petition from being considered untimely." *Id.* The respondent appealed the matter to the Sixth Circuit, asserting that while the dismissal of Hargrove's petition was proper, the district court exceeded its authority to the extent that it tolled the statute of limitations. *Id.* at 718-19.

The Sixth Circuit concluded that while the district court could not rely upon 28 U.S.C. § 2244(d)(2) to toll the limitations period for the time during which Hargrove's petition had been pending in federal court, the district court's decision to equitably toll the statute of limitations was "reasonable under the circumstances of this case and under the conditions set forth by the district court." *Id.* at 720-21. The court observed that while the district court did not issue a stay, "it achieved the same result" obtained in *Artuz* and subsequently approved by the Sixth Circuit in *Palmer v. Carlton,* 276 F.3d 777 (6th Cir. 2002). Hargrove, 300 F.3d at 720-21.

The circumstance in *Sitto v. Bock,* 207 F.Supp.2d 668 (E.D. Mich. 2002), is in all relevant aspects identical to *Hargrove* and *Hill.* Just as in those two cases, the *Sitto* court, faced with the mixed petition dilemma, adopted to approach articulated in *Artuz* so as to permit the exhaustion of unexhausted claims while ensuring that the habeas statute of limitations would not expire while doing so. *Sitto,* 207 F.Supp.2d at 671-677.

While the Court agrees with the reasoning articulated in *Artuz,* and subsequently adopted by the Sixth Circuit in *Hargrove* and *Hill,* and would follow such if presented with that particular circumstance, the present situation is factually distinct. First, Bolton has not filed a mixed petition. Moreover, this is not a circumstance in which Petitioner arguably faced the dilemma of having to choose between (a) filing a mixed petition to "stop" the limitations period, or (b) properly exhausting in state court all of his habeas claims, while risking that the limitations period would expire before he could file his habeas petition in federal court. Finally, as detailed above, Petitioner has not acted with diligence in pursuing his habeas claims.

Finding that the present circumstance is readily distinguishable from that present in the authority on which Petitioner relies, and discerning no other basis on which to equitably toll the limitations period, the Court is still not persuaded that Petitioner is entitled to equitable tolling of the statute of limitations in this matter.

III. Actual Innocence

In response to the present motion, Petitioner asserts that "any procedural default should be excused because he is actually innocent of the conviction for assault with intent to murder." (Dkt. #91 at 2).

First, the concept of "procedural default" has no application in this matter. Under the procedural default doctrine, federal habeas review is barred where a state court declined to address a petitioner's claim because of a failure to satisfy a state procedural requirement. *See Coleman v. Thompson,* 501 U.S. 722, 729-30 (1991). The Court is not recommending the dismissal of Petitioner's action because of his failure to comply with a state procedural rule. Instead, the Court is recommending the dismissal of Petitioner's action because of his failure to comply with the statute of limitations enacted by the United States Congress.

Furthermore, while the Sixth Circuit recently concluded that the statute of limitations articulated in § 2244(d)(1) may be equitably tolled upon a showing of actual innocence, *Souter v. Jones,* – F.3d.–, 2005 WL 86477 at *15-19 (6th Cir., Jan. 18, 2005), Petitioner has failed to establish that he qualifies for such an exception.

To support a claim of actual innocence, a habeas petitioner must demonstrate that, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Id.* at *10 (quoting *Schlup v. Delo,* 513 U.S. 298, 327 1995). A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence – that was not presented at the trial." *Souter,* 2005 WL 86477 at *10 (quoting *Schlup,* 513 U.S. at 324). Furthermore, actual innocence means "factual innocence, not mere legal insufficiency." *Souter,* 2005 WL 86477 at *10 (quoting *Bousley v. United States,* 523 U.S. 614, 623 (1998)). Petitioner has failed to present a credible claim of actual innocence.

In support of his claim of actual innocence Petitioner has submitted the results of two separate polygraph examinations which

were administered in September 2003, eleven years after the events supporting his conviction and about which he was questioned. First, the results of polygraph examinations are inadmissible in Michigan. See *People v. Ray*, 430 N.W.2d 626, 628 (Mich. 1998). Thus Petitioner cannot establish that "it is more likely than not that no reasonable juror would have convicted him."

Even if the results of polygraph examinations were admissible, the reports submitted by Petitioner reveal that he offered wildly conflicting statements regarding the central events which gave rise to his arrest and conviction. Finally, even if a jury were to believe the results of the more "favorable" polygraph examination, such would not preclude Petitioner's conviction for assault with the intent to murder on an aiding and abetting theory. See *People v. Jones*, 506 N.W.2d 542, 543-44 (Mich. Ct. App. 1993) (recognizing that under Michigan law a defendant can be convicted of assault with the intent to murder on an aiding and abetting theory).

CONCLUSION

For all the reasons detailed therein, the undersigned recommends that Respondent's Second Motion to Dismiss for Failure to Comply with the Statute of Limitations, (Dkt. #88), be **granted** and Bolton's petition to be dismissed as untimely.

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of the state of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

Date: February 2, 2005

/s/ Ellen S. Carmody

ELLEN S. CARMODY
United States Magistrate Judge